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No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

W.R. GRACE & CO. – CONN.,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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QUESTION PRESENTED

Whether the Montana State Tax Appeal Board's "standard practice" of issuing opinions in adversary proceedings based on the secret, *ex parte* submissions of the State's attorneys contravenes fundamental principles of fairness in violation of the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES AND RULE 28.1 STATEMENT

All parties to the proceedings below are also parties before the Court.

Petitioner's Rule 28.1 list is attached as App. A at 1a-18a.[1]

[1] All references to the Appendix to this petition are denominated "App.," followed by the unique letter assigned to each item.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASON FOR GRANTING THE PETITION	10
THE MONTANA STATE TAX APPEAL BOARD'S "STANDARD PRACTICE" IN ADJUDICATIVE PROCEEDINGS OF RELYING ON SECRET, *EX PARTE* SUBMISSIONS OF THE DEPARTMENT OF REVENUE RAISES SIGNIFICANT DUE PROCESS ISSUES THAT SHOULD BE RESOLVED BY THIS COURT	10
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
Anderson v. City of Bessemer City, 470 U.S. 564 (1985)	15, 16n
Chicopee Manufacturing Corp. v. Kendall Co., 288 F.2d 719 (4th Cir.), *cert. denied*, 368 U.S. 825 (1961)	13-14
City of Billings v. Billings Firefighters Local No. 521, 200 Mont. 421, 651 P.2d 627 (1982)	7
In re Colony Square Co., 819 F.2d 272 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1271 (1988)	15, 16n
Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454 (4th Cir. 1983)	15, 16n
In re Dekle, 308 So.2d 5 (Fla. 1975)	14
Department of Revenue v. Grouse Mountain Development, 218 Mont. 353, 707 P.2d 1113 (1985)	7
Doe v. Hampton, 566 F.2d 265 (D.C. Cir. 1977)	11
G.M. Leasing Corp. v. United States, 514 F.2d 935 (10th Cir. 1975), *aff'd in part, rev'd in part on other grounds*, 429 U.S. 338 (1977)	14
Gibson v. Berryhill, 411 U.S. 564 (1973)	11
Lassiter v. Department of Social Services of Durham County, 452 U.S. 18 (1981)	10
Marshall v. Jerrico, Inc., 446 U.S. 238 (1980)	10-11

Cases	Page
Montana Tavern Association v. State, 224 Mont. 258, 729 P.2d 1310 (1986)	7
Morgan v. United States, 304 U.S. 1 (1938)	11
In re Paradyne Corp., 803 F.2d 604 (11th Cir. 1986) (*per curiam*)	11
Swan Corp. v. Montana Department of Revenue, 755 P.2d 1388 (1988)	7, 8
Terry v. Board of Regents of Higher Education, 220 Mont. 214, 714 P.2d 151 (1986)	7
United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964)	15
United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974)	15
W.R. Grace & Co. v. Department of Revenue, 779 P.2d 470 (Mont. 1989)	2
In re Wisconsin Steel Co., 48 Bankr. 753 (N.D. Ill. (1985)	17-18
Withrow v. Larkin, 421 U.S. 35 (1975)	11
Constitutional Provisions, Statutes and Rules	
U.S. Const., amend. XIV, § 1	3
28 U.S.C. § 1257(a)	3

	Page
Mont. Const. art. VIII, § 7	3n
Mont. Code Ann. § 15-23-503 (1979)	3, 4n, 4-5, 16-17
Mont. Code Ann. (1989)	
§ 2-4-601 *et seq.*	3-4
§ 15-1-201	3
§ 15-2-101 *et seq.*	3n
§ 15-2-201 *et seq.*	3
§ 15-2-302	3-4
§ 15-6-131	4
§ 15-8-111(6)(a)	4
§ 15-8-601(1)	3
§ 15-23-116(1)	3
§ 15-23-501 *et seq.*	4
1973 Mont. Laws, ch. 100, § 50	3n
Other Authorities	
ABA Code of Judicial Conduct, Canon 3(A)(4)	12n
1 G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1987)	11, 16
Model Code of Professional Responsibility EC 7-35	12n
J. Wright, *The Nonjury Trial – Preparing Findings of Fact, Conclusions of Law, and Opinions Seminars for Newly Appointed United States District Judges* (1962)	15

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DEPARTMENT OF REVENUE OF THE STATE OF MONTANA and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

Petitioner, W.R. Grace & Co. – Conn. ("Grace"), respectfully prays that a writ of certiorari issue to review (i) the judgment of the Supreme Court of Montana, entered in this action on August 18, 1989, and (ii) the order of the Supreme Court of Montana denying Grace's petition for rehearing and its amended petition for rehearing, entered in this action on September 14, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Montana is reported at 779 P.2d 470, as *W.R. Grace & Company vs. Department of Revenue of the State of Montana; and the State Tax Appeal Board of the State of Montana*, and is reprinted as App. B at 19a-33a.[2]

The Montana District Court's order has not been reported and is reprinted as App. D at 35a-41a.

The Montana District Court's order regarding Grace's petition for rehearing has not been reported and is reprinted as App. E at 42a-44a.

The Montana State Tax Appeal Board's findings of fact, conclusions of law, order, and notice of opportunity for judicial review has not been reported and is reprinted as App. F at 45a-75a.

[2] At the commencement of this action, taxpayer's name was W.R. Grace & Co. During the pendence of the action, taxpayer's name was changed to W.R. Grace & Co. – Conn.

JURISDICTION

The judgment of the Montana Supreme Court was filed on August 18, 1989. A timely petition for rehearing and an amended petition for rehearing were denied on September 14, 1989. Grace's amended petition for rehearing is reprinted as App. G at 76a-84a.

Grace invokes the jurisdiction of this Court under 28 U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action involves the Due Process Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const., amend. XIV, § 1. Amendment XIV, § 1 of the Constitution provides in pertinent part that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." This action also involves Mont. Code Ann. §§ 15-23-503, 15-8-601(1), and 15-23-116(1). The Montana statutory provisions are reprinted as App. H at 85a-87a.

STATEMENT OF THE CASE

In order to provide an impartial tribunal to adjudicate controversies between taxpayers and state taxing authorities, the State of Montana created the State Tax Appeals Board ("STAB"). Mont. Code Ann. § 15-2-201 *et seq.* (1989).[3] Among other things, STAB is empowered to hear appeals from decisions of the Montana Department of Revenue (the "Department"), which is charged with the responsibility of assessing and collecting the State's taxes. Mont. Code Ann. § 15-1-201 (1989). Disputes between taxpayers and the Department before STAB are adversary

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[3] STAB was created pursuant to Article VIII, § 7 of the 1972 Montana Constitution, which provides:

> **Tax appeals.** The legislature shall provide independent appeal procedures for taxpayer grievances about appraisals, assessments, equalization, and taxes.

See 1973 Mont. Laws, ch. 100, § 50. The general composition, duty, and authority of STAB are set forth in Mont. Code Ann. § 15-2-101 *et seq.* (1989).

proceedings on the record. Mont. Code Ann. §§ 2-4-601 *et seq.*, 15-2-302 (1989). The resulting adjudicative determinations of STAB are accorded great deference by Montana's courts.

This case involves a challenge to procedures followed by STAB in adjudicating state tax appeals. Petitioner Grace is a Connecticut corporation with its principal place of business in New York. Grace owns and operates a vermiculite mine[4] and related plant and facilities on Vermiculite Mountain, which is located in Lincoln County, Montana. Grace also conducts mining-related operations roughly nine miles away from Vermiculite Mountain in Libby, Montana, and in Cambridge, Massachusetts.

Under Montana law, the value of vermiculite for ad valorem property tax purposes is determined by reference to the net proceeds generated by that property during the preceding year. Net proceeds are computed by deducting specified expenses. Mont. Code Ann. §§ 15-6-131, 15-8-111(6)(a), 15-23-501 *et seq.* (1989).[5] The dispute between Grace and the Department focused on two issues: whether the Department improperly disallowed certain deductions in calculating Grace's net proceeds tax base and whether the Department was barred by the applicable statute of limitations from issuing deficiency assessments against the taxpayer for 1977 and 1978.

The formal controversy began in August 1981 with the issuance by the Department of proposed deficiency assessments regarding Grace's net proceeds tax returns for the years 1977, 1978, and 1979. The statute providing for the computation of taxable net proceeds permits a deduction from the gross proceeds of mines of, among other things,

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[4] Vermiculite is a micaceous mineral used for fireproofing, soil mixes, lightweight concrete, insulation, and other construction materials.

[5] Although the tax years involved in this case are 1977-1979, there has been no material change in the pertinent statutory provisions and citations except for Mont. Code Ann. § 15-23-503. We will therefore refer to the current Montana Code Annotated for all provisions except for Mont. Code Ann § 15-23-503. The version of Mont. Code Ann. § 15-23-503 in effect during 1977 to 1979 is reprinted as App. H at 85a-86a.

> (b) all moneys expended for necessary labor, machinery, and supplies needed and used in the mining operations and developments;
>
> . . . .
>
> (d) all moneys expended for costs of repairs and replacements of the milling and reduction works used in connection with the mine;
>
> . . . .
>
> (f) all moneys actually expended for transporting the ores and mineral products or deposits from the mines to the mill or reduction works or to the place of sale and for extracting the metals and minerals therefrom and for marketing the product and the conversion of the same into money. . . .

Mont. Code Ann. § 15-23-503 (1979).

The Department took the position that under these provisions only "direct" expenses incurred in extracting the vermiculite were deductible. The Department also took the position that the location where an expense was incurred affected whether the expense was a "direct" expense incurred in extracting vermiculite. As a result, the Department did not dispute the deduction of certain expenses (*e.g.*, office and clerical expenses) so long as they were incurred at the mining site. Yet the Department disallowed the deduction for identical expenses incurred in Libby and Cambridge.

The Department also took the position that Grace's accounting method for computing expenses at its Cambridge facility was impermissible under Montana law. As a result, the Department disallowed deductions for certain expenses computed using this method. The Department, however, allowed Grace to deduct certain other Cambridge expenses computed with the same accounting method.

Grace believed that the Department's construction of the statute was unjustifiably restrictive and that all expenses incurred for labor, machinery, supplies, etc., which were necessary to the mining operation, were deductible regardless of whether they were incurred at the mine site, or nine miles away in Libby, or elsewhere. Grace also believed that its accounting method for computing expenses incurred at Cambridge was adequate under Montana law for *all* expenses incurred at Cambridge. The Department and Grace also disagreed as to whether the applicable statute of limitations barred any assessment for net proceeds taxes for the years 1977 and 1978.

Following informal discussions at which the parties failed to resolve their differences, the Department issued a final notice of deficiency in April 1983. Grace appealed the Department's determination to STAB, the State's independent review agency. A hearing on the disputed issues was held before STAB in November 1986. The Department was represented at this hearing by Paul Van Tricht ("Van Tricht"). At the hearing, Grace presented the testimony of numerous witnesses as well as substantial documentary evidence. The Department presented no witnesses and limited documentary evidence. At the close of the hearing, STAB took the case under submission.

Prior to the announcement of its decision, *and unbeknownst to Grace*, STAB's chairman contacted Van Tricht and requested that Van Tricht prepare STAB's findings of fact and conclusions of law. (App. I at 89a-90a). Neither STAB nor Van Tricht ever formally or informally notified counsel for Grace of this extraordinary *ex parte* communication. Without affording Grace any opportunity to dispute the Department's interpretation of the law or the facts, Van Tricht proceeded to prepare "STAB's" opinion in this case.

The "STAB" opinion drafted by the Department of Revenue predictably adopted the Department's interpretation of critical legal and factual issues. The opinion held that "only the direct expenses actually incurred in extracting the mineral" were deductible. (App. F at 66a). The "STAB" opinion also adopted the Department's inconsistent treatment of expenses. The opinion

disallowed deductions for certain administrative expenses incurred in Libby and Cambridge, even though deductions for identical expenses incurred at the mine site had been allowed by the Department. (App. F at 50a, 57a, 69a; App. E at 44a). The opinion also disallowed deductions for certain expenses incurred at Cambridge because they were calculated under an impermissible accounting method even though deductions for other Cambridge expenses computed under the identical method had been allowed by the Department. (App. F at 55a, 56a-57a).

Grace sought judicial review of STAB's opinion with the First Judicial District Court of Lewis and Clark County. In recognition of the fact that STAB's decisions are made — or, at least, are presumed to be made — by an independent agency, Montana statutory and case law does not provide for *de novo* review of STAB's decisions by the judiciary. Moreover, the Montana Supreme Court has made it clear that courts must pay special respect to STAB's determinations because "it is not a judicial function to act as an authority on taxation matters." *Department of Revenue v. Grouse Mountain Development*, 218 Mont. 353, 355, 707 P.2d 1113, 1115 (1985).

In conformity with these principles, two settled rules of Montana jurisprudence circumscribe the scope of judicial review of STAB's decisions. STAB's findings of fact are upheld unless they are "clearly erroneous," and its conclusions of law are sustained unless they constitute an "abuse of discretion." *Swan Corp. v. Montana Department of Revenue*, 755 P.2d 1388, 1390 (1988); *Montana Tavern Association v. State*, 224 Mont. 258, 265, 729 P.2d 1310, 1316 (1986); *Terry v. Board of Regents of Higher Education*, 220 Mont. 214, 219, 714 P.2d 151, 154 (1986); *City of Billings v. Billings Firefighters Local No. 521*, 200 Mont. 421, 430, 651 P.2d 627, 632 (1982). An "abuse of discretion" results only "if an agency's interpretation of a statute is clearly contrary to the legislative intent behind that statute." *Swan Corp.*, 755 P.2d at 1390.[6]

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[6] There can be no dispute about these principles of judicial review of STAB decisions. The foregoing discussion closely tracks the Department's brief to the Montana Supreme Court in this case. (App. J at 92a-95a).

Confined by these standards of review, and ignorant of the fact that it was scrutinizing a Department-drafted opinion rather than an opinion written by an independent agency, the district court unsurprisingly affirmed "STAB's" opinion in its entirety. With respect to the disputed expenses, the court found STAB's disallowance of Grace's deductions to be "largely a question of fact." (App. D at 40a). Based on this reading of STAB's opinion, the court applied the deferential "clearly erroneous" standard in reaching its conclusion. (App. D at 37a-38a).

On its appeal of the district court's decision to the Montana Supreme Court, Grace faced essentially the same procedural barriers to its case that confronted it in the district court. Just as the district court accords great deference to STAB's findings of fact and conclusions of law, so the Montana Supreme Court, in reviewing a district court's review of a STAB opinion, accords similar deference to the lower court's determination. Thus, after reiterating the established rule of Montana law that STAB's findings of fact are to be sustained unless "clearly erroneous" and its conclusions of law to be respected unless there is "an abuse of discretion," the Montana Supreme Court declared that "[t]hese standards . . . also apply to our review of the District Court." *Swan Corp.*, 755 P.2d at 1390.

In light of the Montana Supreme Court's limited scope of review, and its unawareness that it was reviewing the handiwork of the Department rather than that of an independent agency, the Montana Supreme Court affirmed the district court's opinion denying Grace's claims. Deferring to the State's purportedly independent tax tribunal, the court adopted STAB's "direct" costs standard for determining the deductibility of expenses. (App. B at 28a). The court also adopted the Department's and STAB's inconsistent treatment of Grace's expenses. (Id.).

After Grace had petitioned the Montana Supreme Court to rehear its case, but before the court ruled on the petition, Grace's counsel learned that the Department's counsel, Van Tricht, had admitted under oath that he had secretly prepared STAB's opinion in this case. (App. I at 89a-90a). At the same time, Grace's

counsel learned that the secret, *ex parte* preparation by the Department's attorney of the STAB opinion was not merely an isolated incident, but in fact constituted STAB's "standard practice" which had been employed in a number of other cases. (App. I at 89a-90a). Indeed, counsel further learned that STAB had taken deliberate steps to conceal this practice from opposing counsel by instructing Department attorneys to dispense with transmittal letters accompanying the Department-drafted "STAB" opinions to avoid the possibility that such letters might be discovered by opposing counsel.[7]

Upon discovering these facts, Grace filed an amended petition for rehearing in the Montana Supreme Court. It pointed out to the court that the secret, *ex parte* communications between the Department and STAB were contrary to the fundamental principles of fairness that underlie our adversary system, that they undermined the integrity of the entire process by which decision had been reached in the case, and that they denied Grace due process of law in violation of the Fourteenth Amendment. (App. G at 76a-84a). Barely 48 hours after Grace filed its amended petition for rehearing, the Montana Supreme Court denied the petition. (App. C at 34a).

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[7] David Woodgerd, counsel for the Department, testified as follows with respect to the request of Mr. Raundal, then Chairman of STAB, that the Department discontinue its practice of sending transmittal letters along with the opinions it drafted for STAB:

> I guess my understanding was that in fact Mr. Raundal at least, who was as I said Chairman of the State Tax Appeal Board, felt that it would have been better if there wasn't a transmittal letter so that opposing Counsel would not have been aware of the fact that the Department had in fact prepared the findings in the Helmmco case.
>
> Deposition of David Woodgerd, *PacifiCorp v. Department of Revenue*, No. CDV-89-344 (Mont. First Judicial District, Lewis and Clark County), June 6, 1989, p. 29 (App. L at 107a).

It should be noted that on November 21, 1989, a court in the First Judicial District of Montana remanded the PacifiCorp case to STAB because of its concern about STAB's "unlawful procedure." Memorandum and Order, *PacifiCorp v. Department of Revenue*, Cause No. CDV-89-344 (Mont. First Judicial District, Lewis and Clark County).

REASON FOR GRANTING THE PETITION

THE MONTANA STATE TAX APPEAL BOARD'S "STANDARD PRACTICE" IN ADJUDICATIVE PROCEEDINGS OF RELYING ON SECRET, *EX PARTE* SUBMISSIONS OF THE DEPARTMENT OF REVENUE RAISES SIGNIFICANT DUE PROCESS ISSUES THAT SHOULD BE RESOLVED BY THIS COURT

No right is more critical to our system of justice, and to our conception of "fundamental fairness" embodied in the Due Process Clause, *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 24-25 (1981), than the right to a fair trial before an impartial tribunal. In this case, the right was denied to Grace because of secret, *ex parte* communications between the decision-making body and opposing counsel in the course of adversary proceedings. The denial of Grace's right to an impartial adjudication cannot be dismissed as an isolated, if unfortunate, abrogation of one litigant's due process rights. The secret, *ex parte* communications that tainted the instant proceedings reflect a "standard practice" in proceedings before STAB. The Montana Supreme Court's summary dismissal of Grace's claim therefore raises a significant due process question with implications far beyond Petitioner's own case. Furthermore, STAB's "standard practice" of making secret, *ex parte* communications in contested cases may also be the standard practice of administrative agencies in other states. This case, therefore, warrants plenary consideration by this Court.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). As this Court has explained, the requirement of neutrality in adjudicative proceedings safeguards two central concerns of procedural due process: it helps guarantee that a person's "life, liberty, or property

will not be taken on the basis of an erroneous or distorted conception of the facts or the law," and it "preserves both the appearance and reality of fairness" for a person whose interests are at stake "by ensuring that . . . the arbiter is not predisposed to find against him." *Id.* These principles, and the reasons underlying them, apply to all adjudicative proceedings, including administrative proceedings like those conducted by STAB in this case. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

One of the essential characteristics of a fair trial in a fair tribunal is the absence of *ex parte* communications between the tribunal and the parties to the adjudicative proceedings. "[E]x parte communications by an adversary party to a decision-maker in an adjudicatory proceeding are prohibited as fundamentally at variance with our conceptions of due process." *Doe v. Hampton*, 566 F.2d 265, 276 (D.C. Cir. 1977). The justifications for this principle are apparent. If one party to adversary proceedings has secret access to the decision-maker, the risk that the *ex parte* communications will unfairly influence the decision-maker and thereby compromise the integrity of the decision-making process is substantial. "[A] fair hearing requires 'a reasonable opportunity to know the claims of the opposing party and to meet them.'" *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir. 1986) (*per curiam*) (*quoting Morgan v. United States*, 304 U.S. 1, 18 (1938)). Indeed, the most basic premise of our adversary system is "that equals will meet in a fair contest before a neutral tribunal." 1 G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 389-90 (1987). *Ex parte* contacts destroy this premise by tilting the scales of justice in favor of the party with secret access to the ear of the decision-maker and depriving the opposing party of an opportunity to respond. *Id.* The incompatibility of *ex parte* communications with the core values

underlying our adversary system is also reflected in the rules governing the bar[8] and judiciary.[9]

The procedure followed by STAB in this and other cases violates the rule against *ex parte* communications in adjudicative proceedings. The sworn testimony of counsel for the Department of Revenue reveals that these violations are deliberate and persistent. David W. Woodgerd, Chief Legal Counsel for the Montana Department of Revenue, testified in an affidavit[10] and subsequently in a deposition that it was the "practice" of STAB to request that counsel for the Department prepare findings of fact and conclusions of law in contested cases (App. K at 97a-98a;

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[8] The Model Code of Professional Responsibility EC 7-35, provides:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, *a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel* or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

(Emphasis added)

[9] Canon 3(A)(4), ABA Code of Judicial Conduct for United States Judges provides that "[a] judge should . . . neither initiate nor consider *ex parte* . . . communications concerning a pending or impending proceeding."

[10] Affidavit of David W. Woodgerd, *PacifiCorp v. Department of Revenue*, No. CDV 89-344 (Mont. First Judicial District, Lewis and Clark County), May 18, 1989 (App. K at 96a-101a).

App. L at 110a);[11] that counsel had prepared such findings and conclusions in a number of cases, which he identified with varying degrees of specificity (App. L at 102a-104a); that the findings and conclusions were not submitted to opposing counsel (App. L at 109a-111a); that lack of notice to opposing counsel reflected STAB's "policy" (App. L at 108a)[12] and "practice" (App. L at 109a-111a); and that STAB instructed him to send the findings and conclusions to STAB without a transmittal letter so as to avoid the possibility that opposing counsel would discover that the Department had prepared the findings and conclusions. (App. L at 107a).

Paul Van Tricht, Tax Counsel for the Department of Revenue and counsel for the Department in this case, testified in a deposition[13] that he had been requested by STAB to prepare opinions in contested cases (App. I at 88a-90a), including the instant case (App. I at 89a-90a); that this was STAB's "standard procedure" (App. I at 90a) and "standard practice" (Id.); and that he did not inform opposing counsel of the requests (App. I at 88a) or send copies of the opinions he drafted to opposing counsel (App. I at 91a).

Ex parte communications of the kind that have occurred in this case have been widely condemned by the courts. For example, in *Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719 (4th Cir.), *cert. denied*, 368 U.S. 825 (1961), the district court ruled for the plaintiff in a patent infringement action, issuing a preliminary opinion that set forth the applicable principles of law and findings of fact in general terms. A month later,

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[11] Woodgerd also testified that STAB occasionally made similar requests to taxpayers' counsel. (App. K at 99a).

[12] "[I]t was STAB's wish that opposing Counsel not be notified. . . ." (App. L at 113a).

[13] Deposition of Paul Van Tricht, *Norfolk Energy Inc. v. Department of Revenue*, Cause No. DV-89-089 (Mont. Twelfth Judicial District, Hill County), July 21, 1989 (App. I at 88a-91a).

however, the court issued an elaborate opinion in which specific findings of fact were made and the legal issues discussed in more detail. This opinion had been prepared by counsel for the plaintiff at the request of the court without notice to counsel for the defendant. In reversing the district court's opinion, the court declared:

> The manner in which the opinion of the District Judge was prepared in this case cannot be approved. There is authority for the submission to the court of proposed findings of fact and conclusions of law by the attorneys for the opposing parties in a case, and the adoption of such of the proposed findings and conclusions as the judge may find to be proper. In South Carolina, we are told, under a practice that prevails widely in the trial courts of the state, the opinion is frequently prepared at the request of the judge by the attorney for the successful party. But *there is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side. That practice involves the failure of the trial judge to perform his judicial function and when it occurs without notice to the opposing side, as in this case, it amounts to a denial of due process.*

Id. at 724-25 (emphasis added) (citations omitted). *See also G.M. Leasing Corp. v. United States*, 514 F.2d 935, 940 (10th Cir. 1975) (rejecting findings of fact and conclusions of law that the district court had unilaterally adopted from one party and observing that "[t]his practice of the same trial judge has been twice condemned"), *aff'd in part, rev'd in part on other grounds*, 429 U.S. 338 (1977); *In re Dekle*, 308 So.2d 5, 11 (Fla. 1975) (disciplining an appellate judge for using a memorandum submitted *ex parte* as the basis for a dissenting opinion).

Even in cases in which notice has been given to opposing counsel, reviewing courts have uniformly castigated trial courts for adopting findings of fact and conclusions of law drafted by

one of the parties to an adversary proceeding. As a federal appeals court recently observed, "[t]his circuit and other appellate courts have repeatedly condemned the ghostwriting of judicial orders by litigants," *In re Colony Square Co.*, 819 F.2d 272, 274 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1271 (1988), and "[t]he cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion." *Id.* at 274-75. The evils of this practice have been identified time and again by courts and commentators. "When an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming." *In re Colony Square Co.*, 819 F.2d at 275. "The adversarial zeal of counsel for the prevailing party too often infects what should be disinterested findings to entrust their preparation to the successful attorney." *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 459 (4th Cir. 1983).

This Court has joined the chorus of criticism directed at courts' adoption of findings of fact and conclusions of law prepared by one party to an adversary proceeding. "We . . . have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985) (*citing United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964) and *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615 n.13 (1974)). This Court has recognized, as have other courts, "the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor." *City of Bessemer*, 470 U.S. at 572 (*citing* J. Wright, *The Nonjury Trial – Preparing Findings of Fact, Conclusions of Law, and Opinions Seminars for Newly Appointed United States District Judges* 159, 166 (1962)).

While it is clearly objectionable for courts to adopt one litigant's findings and conclusions when opposing counsel is notified of the practice, when the practice is carried on in secret

as it was in this case, it violates due process. In contrast to those cases in which courts have grudgingly accepted adjudicative tribunals' reliance on submission by counsel,[14] in this case opposing counsel was accorded no opportunity to respond to its adversary's submissions. Indeed, the facts of this case present the most egregious form of *ex parte* contact. STAB, *without notice to opposing counsel*, contacted the Department and requested it to draft the opinion in a contested case. The Department, *without notice to opposing counsel* and in accordance with STAB's "wish" (App. L at 113a) that opposing counsel not be notified, secretly complied with STAB's request. And STAB, *without notice to opposing counsel*, adopted the Department-drafted opinion. This systematic deprivation of the opportunity of one party to adjudicative proceedings to respond to the proposed findings and conclusions drafted by its adversary — a deprivation which has been and remains STAB's policy (App. L at 108a) — far exceeds the bounds of the *ex parte* contacts that have on occasion been tolerated by the courts and is deeply offensive to the principles of fairness protected by the Due Process Clause. As two noted commentators have observed, "[u]nauthorized ex parte contacts directly undermine the [adversary] system, for they deprive the opposing party of an opportunity to respond." 1 G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 390 (1987).

Moreover, in contrast to cases in which it may be asserted that a party was not prejudiced by an *ex parte* contact, here Grace suffered palpable harm. The STAB opinion, drafted as it was by the Department, resolved critical issues against Grace that were subject to review only by the restrictive "clearly erroneous" and "abuse of discretion" standards. *See* pp. 6-7 *supra*. Thus the opinion parroted the Department's view that "only the direct expenses actually incurred in extracting the mineral" were deductible rather than all expenses "necessary" for mining or "used

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[14] *See, e.g., Anderson v. City of Bessemer City, supra; In re Colony Square Co., supra; Cuthbertson v. Biggers Bros., Inc., supra.*

in connection with the mine" as the statute provided. Mont. Code Ann. § 15-23-503 (1979); *see* p. 6 *supra*.

The opinion also maintained the Department's inconsistent positions with respect to Grace's expenses. The opinion disallowed the deduction of administrative expenses incurred at Libby and Cambridge even though deductions for the identical expenses incurred at the mine site were allowed by the Department. *See* pp. 6-7 *supra*. The opinion disallowed certain Cambridge expenses on the ground that they were computed under an impermissible accounting method even though other expenses computed under the same accounting method were allowed by the Department. *See* p. 7 *supra*.

Had Grace been accorded an opportunity to respond to the Department's proposed findings and conclusions before they were frozen into STAB's opinion, Grace would have spared no effort in demonstrating to STAB the weaknesses in those findings and conclusions. Even if Grace had not been entirely successful in pressing its case before STAB, the very existence of Grace's objections to the Department's findings would have required STAB to wrestle with the difficult issues raised by the case and, perhaps, to settle on a position that was less one-sided than the Department-drafted opinion that STAB rubber-stamped. Deprived of an opportunity to attack the Department's questionable determinations when they were first insinuated into STAB's opinion by counsel for the Department, Grace was forced instead to fight the much more difficult battle of overturning STAB's findings and conclusions, which were reversible only if found to be "clearly erroneous" or an "abuse of discretion."

Although Grace has therefore been prejudiced by the secret, *ex parte* preparation of STAB's opinion by opposing counsel which has tainted the entire proceedings in this case, even if the prejudice were less clear, the case would be no less deserving of consideration by this Court. For the vice of *ex parte* communications like those at issue here is that they inevitably carry with them a substantial risk of prejudice, the precise impact of which may be unknown or unknowable. As one court has observed,

> [i]t is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declarations. This is why the prohibition is not against "prejudicial" *ex parte* communications, but against *ex parte* communications.

In re Wisconsin Steel Co., 48 Bankr. 753, 760 (N.D. Ill. 1985).

Furthermore, this case warrants plenary consideration by this Court because it reflects a deliberate and continuing practice of the Montana state taxing authorities that seriously jeopardizes the due process rights of hundreds of litigants before STAB. Despite the Department's own recognition that courts have condemned the practice,[15] the Department has shown no inclination to discontinue it. On the contrary, counsel for the Department has testified that it seeks to "please" STAB, even when pleasing STAB takes the form of drafting *ex parte* opinions for STAB without notice to opposing counsel. (App. K at 108a). Nor has STAB, which initiated the practice, given any suggestion that it does not intend to follow the practice in the future. Indeed, in light of the fact that STAB's use of secret, *ex parte* submissions by counsel as the basis for its opinions is "standard practice" and "standard procedure" (App. I at 88a, 90a-91a) which the Montana Supreme Court has refused to disturb, one can reasonably presume that the practice will continue in the absence of further guidance from this Court.

Finally, it is worth noting that the Department offers only the weakest of justifications for STAB's practice:

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[15] "The Department has never denied that the Courts are critical of the prevailing party drafting a decision for the decision-makers consideration." Reply Brief Supporting Department's Motion for Partial Summary Judgment and Opposing PacifiCorp's Motion, *PacifiCorp v. Department of Revenue*, No. CDV 89-344 (Mont. First Judicial District, Lewis and Clark County) July 28, 1989, at 2, n.2.

> While this practice may not be perfect in theory, it is necessary in practice in order to resolve disputes in a reasonably timely fashion. Forbidding the practice of requesting the prevailing party to draft the order will condemn Montana citizens to a longer delay in settling tax disputes.

Department's Brief in Support of Motion for Partial Summary Judgment, *PacifiCorp v. Department of Revenue*, No. CDV-344 (Mont. First Judicial District, Lewis and Clark County) May 24, 1989, at 5-6. The Department's lame excuse for the practice of denying opposing counsel an opportunity to respond to its adversary's proposed findings and conclusions is disingenuous at best. Petitioner knows of no party — including the Department, in those cases in which a decision has been rendered against it — who would not willingly suffer the "delay" that would be occasioned by an opportunity to respond to its adversary's proposed secret, *ex parte* findings and conclusions before they are incorporated wholesale into a "STAB" opinion. As for the State's desire to expedite the decision-making process in cases in which it has prevailed, it is, after all, a central function of the Due Process Clause to put a brake on procedures that threaten to compromise the litigants' rights.

In short, STAB's practice of soliciting and adopting secret, *ex parte* submissions of draft opinions from the Department without notice to opposing counsel raises important due process concerns that should be addressed by this Court. The Due Process Clause guarantees that both parties to adjudicative proceedings have the right to a full and fair opportunity to present their cases to an impartial decision-maker. At the very least, STAB's practice places that right in grave danger. In view of STAB's apparent determination to continue its questionable practice, it is incumbent upon this Court to establish constitutionally acceptable limits on *ex parte* contacts for litigants like Petitioner, whose due process rights have been, and are being, imperiled by STAB. The Court should make it clear to STAB and all other adjudicative bodies that secret, *ex parte* communications in contested cases will not be tolerated.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Montana Supreme Court should be granted.

Dated: December 7, 1989

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

APPENDIX A

Petitioner W.R. Grace & Co. – Conn.'s
Rule 28.1 List of Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries)
and Affiliates

Babcock Artificial Kidney Center, Inc.

Berisford Cocoa Sales, Inc.

Bio-Medical Applications Management Company, Inc.

Bio-Medical Applications of Abilene, Inc.

Bio-Medical Applications of Abington, Inc.

Bio-Medical Applications of Adrian, Inc.

Bio-Medical Applications of Aguadilla, Inc.

Bio-Medical Applications of Akron, Inc.

Bio-Medical Applications of Alachua, Inc.

Bio-Medical Applications of Alameda County, Inc.

Bio-Medical Applications of Albuquerque, Inc.

Bio-Medical Applications of Alexandria, Inc.

Bio-Medical Applications of Alice, Inc.

Bio-Medical Applications of Allentown, Inc.

Bio-Medical Applications of Amarillo, Inc.

Bio-Medical Applications of Anacostia, Inc.

Bio-Medical Applications of Anderson, Inc.

Bio-Medical Applications of Ann Arbor, Inc.

Bio-Medical Applications of Anna, Inc.

Bio-Medical Applications of Annapolis, Inc.

Bio-Medical Applications of Apopka, Inc.

Bio-Medical Applications of Arecibo, Inc.

Bio-Medical Applications of Arkansas, Inc.

Bio-Medical Applications of Arlington, Inc.

Bio-Medical Applications of Asheboro, Inc.

Bio-Medical Applications of Atlanta, Inc.

Bio-Medical Applications of Bakersfield, Inc.

Bio-Medical Applications of Baton Rouge, Inc.

Bio-Medical Applications of Baton Rouge Airport, Inc.

Bio-Medical Applications of Bayamon, Inc.

Bio-Medical Applications of Baytown, Inc.

Bio-Medical Applications of Beaumont, Inc.

Bio-Medical Applications of Beckley, Inc.

Bio-Medical Applications of Bedford, Inc.

Bio-Medical Applications of Bellmead, Inc.

Bio-Medical Applications of Bethlehem, Inc.

Bio-Medical Applications of Bexar County, Inc.

Bio-Medical Applications of Blue Springs, Inc.

Bio-Medical Applications of Bluefield, Inc.

Bio-Medical Applications of Bossier, Inc.

Bio-Medical Applications of Boston, Inc.

Bio-Medical Applications of Bradenton, Inc.

Bio-Medical Applications of Brandon, Inc.

Bio-Medical Applications of Brooksville, Inc.

Bio-Medical Applications of Bunkie, Inc.

Bio-Medical Applications of Burlington, Inc.

Bio-Medical Applications of Butler, Inc.

Bio-Medical Applications of Caguas, Inc.

Bio-Medical Applications of Camarillo, Inc.

Bio-Medical Applications of Camden, Inc.

Bio-Medical Applications of Camp Springs, Inc.

Bio-Medical Applications of Canton, Inc.

Bio-Medical Applications of Cape Cod, Inc.

Bio-Medical Applications of Capitol Hill, Inc.

Bio-Medical Applications of Carbondale, Inc.

Bio-Medical Applications of Carolina, Inc.

Bio-Medical Applications of Carrollton, Inc.

Bio-Medical Applications of Carson, Inc.

Bio-Medical Applications of Carthage, Inc.

Bio-Medical Applications of Central Baltimore, Inc.

Bio-Medical Applications of Central Baton Rouge, Inc.

Bio-Medical Applications of Central Georgia, Inc.

Bio-Medical Applications of Central Philadelphia, Inc.

Bio-Medical Applications of Central San Antonio, Inc.

Bio-Medical Applications of Central El Paso, Inc.

Bio-Medical Applications of Charleston, Inc.

Bio-Medical Applications of Charlotte, Inc.

Bio-Medical Applications of Charlotte West, Inc.

Bio-Medical Applications of Chattahoochee, Inc.

Bio-Medical Applications of Chester, Inc.

Bio-Medical Applications of Chula Vista, Inc.

Bio-Medical Applications of Clearwater, Inc.

Bio-Medical Applications of Columbia, Inc.

Bio-Medical Applications of Columbia Heights, Inc.

Bio-Medical Applications of Columbus, Inc.

Bio-Medical Applications of Concord, Inc.

Bio-Medical Applications of Coral Gables, Inc.

Bio-Medical Applications of Corpus Christi, Inc.

Bio-Medical Applications of Covington, Inc.

Bio-Medical Applications of Crowley, Inc.

Bio-Medical Applications of Cypress Creek, Inc.

Bio-Medical Applications of Dallas, Inc.

Bio-Medical Applications of Decatur, Inc.

Bio-Medical Applications of DeKalb-Gwinnett, Inc.

Bio-Medical Applications of Desert Valley, Inc.

Bio-Medical Applications of Detroit, Inc.

Bio-Medical Applications of District of Columbia, Inc.

Bio-Medical Applications of Dover, Inc.

Bio-Medical Applications of Eagle Pass, Inc.

Bio-Medical Applications of East Dallas, Inc.

Bio-Medical Applications of East New Orleans, Inc.

Bio-Medical Applications of East Orange, Inc.

Bio-Medical Applications of East Orlando, Inc.

Bio-Medical Applications of East Stroudsburg, Inc.

Bio-Medical Applications of East Texas, Inc.

Bio-Medical Applications of Eastern Philadelphia, Inc.

Bio-Medical Applications of Eastern Virginia, Inc.

Bio-Medical Applications of Eastman, Inc.

Bio-Medical Applications of Easton, Inc.

Bio-Medical Applications of El Paso, Inc.

Bio-Medical Applications of Ennis, Inc.

Bio-Medical Applications of Episcopal, Inc.

Bio-Medical Applications of Eureka, Inc.

Bio-Medical Applications of Evanston, Inc.

Bio-Medical Applications of Fairmont, Inc.

Bio-Medical Applications of Fajardo, Inc.

Bio-Medical Applications of Fayetteville, Inc.

Bio-Medical Applications of Fort Collins, Inc.

Bio-Medical Applications of Fort Worth, Inc.

Bio-Medical Applications of Framingham, Inc.

Bio-Medical Applications of Gainesville, Inc.

Bio-Medical Applications of Galveston, Inc.

Bio-Medical Applications of Garland, Inc.

Bio-Medical Applications of Georgetown, Inc.

Bio-Medical Applications of Germantown, Inc.

Bio-Medical Applications of Glendale, Inc.

Bio-Medical Applications of Grand Prairie, Inc.

Bio-Medical Applications of Grant Park

Bio-Medical Applications of Greater Baltimore, Inc.

Bio-Medical Applications of Greeley, Inc.

Bio-Medical Applications of Greensboro, Inc.

Bio-Medical Applications of Greensburg, Inc.

Bio-Medical Applications of Greenville, Inc.

Bio-Medical Applications of Guayama, Inc.

Bio-Medical Applications of Hammond, Inc.

Bio-Medical Applications of Hazleton, Inc.

Bio-Medical Applications of Hialeah, Inc.

Bio-Medical Applications of Hillside, Inc.

Bio-Medical Applications of Houston, Inc.

Bio-Medical Applications of Hunt County, Inc.

Bio-Medical Applications of Huntsville, Inc.

Bio-Medical Applications of Indian River, Inc.

Bio-Medical Applications of Irving, Inc.

Bio-Medical Applications of Irvington, Inc.

Bio-Medical Applications of Jackson, Inc.

Bio-Medical Applications of Jasper, Inc.

Bio-Medical Applications of Jersey City, Inc.

Bio-Medical Applications of Kansas City, Inc.

Bio-Medical Applications of Kendall, Inc.

Bio-Medical Applications of Kittanning, Inc.

Bio-Medical Applications of Kokomo, Inc.

Bio-Medical Applications of Lafayette, Inc.

Bio-Medical Applications of Lake City, Inc.

Bio-Medical Applications of Lamesa, Inc.

Bio-Medical Applications of Laredo, Inc.

Bio-Medical Applications of Las Americas, Inc.

Bio-Medical Applications of Latrobe, Inc.

Bio-Medical Applications of Laurel, Inc.

Bio-Medical Applications of Lewiston, Inc.

Bio-Medical Applications of Lexington, Inc.

Bio-Medical Applications of Lincoln, Inc.

Bio-Medical Applications of Livonia, Inc.

Bio-Medical Applications of Long Beach, Inc.

Bio-Medical Applications of Los Angeles, Inc.

Bio-Medical Applications of Louisville, Inc.

Bio-Medical Applications of Lowell, Inc.

Bio-Medical Applications of Lubbock, Inc.

Bio-Medical Applications of Lumberton, Inc.

Bio-Medical Applications of Macon, Inc.

Bio-Medical Applications of Manchester, Inc.

Bio-Medical Applications of Mansfield, Inc.

Bio-Medical Applications of Marrero, Inc.

Bio-Medical Applications of Martinsburg, Inc.

Bio-Medical Applications of Mayaguez, Inc.

Bio-Medical Applications of Mesquite, Inc.

Bio-Medical Applications of Metairie, Inc.

Bio-Medical Applications of Metropolitan Miami, Inc.

Bio-Medical Applications of Metropolitan Philadelphia, Inc.

Bio-Medical Applications of Miami, Inc.

Bio-Medical Applications of Midland, Inc.

Bio-Medical Applications of Milledgeville, Inc.

Bio-Medical Applications of Minden, Inc.

Bio-Medical Applications of MLK, Inc.

Bio-Medical Applications of Mobile, Inc.

Bio-Medical Applications of Monroe, Inc.

Bio-Medical Applications of Monroeville, Inc.

Bio-Medical Applications of Montgomery, Inc.

Bio-Medical Applications of Napoleonville, Inc.

Bio-Medical Applications of Natchitoches, Inc.

Bio-Medical Applications of National City, Inc.

Bio-Medical Applications of New Castle, Inc.

Bio-Medical Applications of New Hampshire, Inc.

Bio-Medical Applications of New Iberia, Inc.

Bio-Medical Applications of New Market, Inc.

Bio-Medical Applications of New Orleans, Inc.

Bio-Medical Applications of New River Valley, Inc.

Bio-Medical Applications of New York, Inc.

Bio-Medical Applications of Newberry, Inc.

Bio-Medical Applications of Newington, Inc.

Bio-Medical Applications of Norfolk, Inc.

Bio-Medical Applications of North Charlotte, Inc.

Bio-Medical Applications of North Chicago, Inc.

Bio-Medical Applications of North City, Inc.

Bio-Medical Applications of North Dallas, Inc.

Bio-Medical Applications of North Houston, Inc.

Bio-Medical Applications of Northeast Albuquerque, Inc.

Bio-Medical Applications of Northeast D.C., Inc.

Bio-Medical Applications of Northeast San Antonio, Inc.

Bio-Medical Applications of Northeast Wisconsin, Inc.

Bio-Medical Applications of Northeastern Philadelphia, Inc.

Bio-Medical Applications of Northern Alabama, Inc.

Bio-Medical Applications of Northern Philadelphia, Inc.

Bio-Medical Applications of Northwest Louisiana, Inc.

Bio-Medical Applications of Northwest Philadelphia, Inc.

Bio-Medical Applications of Oakland, Inc.

Bio-Medical Applications of Ocala, Inc.

Bio-Medical Applications of Opelika, Inc.

Bio-Medical Applications of Opelousas, Inc.

Bio-Medical Applications of Orange, Inc.

Bio-Medical Applications of Orlando, Inc.

Bio-Medical Applications of Palmetto, Inc.

Bio-Medical Applications of Pasadena, Inc.

Bio-Medical Applications of Philadelphia, Inc.

Bio-Medical Applications of Pine Brook, Inc.

Bio-Medical Applications of Pittsburgh, Inc.

Bio-Medical Applications of Plano, Inc.

Bio-Medical Applications of Ponce, Inc.

Bio-Medical Applications of Port Orange, Inc.

Bio-Medical Applications of Port St. Lucie, Inc.

Bio-Medical Applications of Portland, Inc.

Bio-Medical Applications of Pottsville, Inc.

Bio-Medical Applications of Providence, Inc.

Bio-Medical Applications of Pulaski, Inc.

Bio-Medical Applications of Richmond, Inc.

Bio-Medical Applications of Rio Piedras, Inc.

Bio-Medical Applications of Roanoke, Inc.

Bio-Medical Applications of Rosenberg, Inc.

Bio-Medical Applications of San Antonio, Inc.

Bio-Medical Applications of San Diego, Inc.

Bio-Medical Applications of San German, Inc.

Bio-Medical Applications of San Juan, Inc.

Bio-Medical Applications of Sandersville, Inc.

Bio-Medical Applications of Sanford, Inc.

Bio-Medical Applications of Santa Fe, Inc.

Bio-Medical Applications of Sarasota, Inc.

Bio-Medical Applications of Scottsboro, Inc.

Bio-Medical Applications of Seguin, Inc.

Bio-Medical Applications of Selma, Inc.

Bio-Medical Applications of Shelby, Inc.

Bio-Medical Applications of Shreveport, Inc.

Bio-Medical Applications of Smyth County, Inc.

Bio-Medical Applications of Somerset, Inc.

Bio-Medical Applications of South Arlington, Inc.

Bio-Medical Applications of South Carolina, Inc.

Bio-Medical Applications of South Columbia, Inc.

Bio-Medical Applications of South Dallas, Inc.

Bio-Medical Applications of South Hills, Inc.

Bio-Medical Applications of South Phoenix, Inc.

Bio-Medical Applications of South Plains, Inc.

Bio-Medical Applications of South Queens, Inc.

Bio-Medical Applications of South San Antonio, Inc.

Bio-Medical Applications of South St. Petersburg, Inc.

Bio-Medical Applications of Southeast Washington, Inc.

Bio-Medical Applications of Southeastern Massachusetts, Inc.

Bio-Medical Applications of Southern Indiana, Inc.

Bio-Medical Applications of Southwest Houston, Inc.

Bio-Medical Applications of Southwest Jackson, Inc.

Bio-Medical Applications of Southwest San Antonio, Inc.

Bio-Medical Applications of Southwest Shreveport, Inc.

Bio-Medical Applications of Southwestern Pennsylvania, Inc.

Bio-Medical Applications of Springfield, Inc.

Bio-Medical Applications of Sterling, Inc.

Bio-Medical Applications of St. Petersburg, Inc.

Bio-Medical Applications of Suffolk, Inc.

Bio-Medical Applications of Takoma Park, Inc.

Bio-Medical Applications of Tampa, Inc.

Bio-Medical Applications of Tarpon Springs, Inc.

Bio-Medical Applications of Thibodaux, Inc.

Bio-Medical Applications of Three Rivers, Inc.

Bio-Medical Applications of Tomball, Inc.

Bio-Medical Applications of Torrance, Inc.

Bio-Medical Applications of Trenton, Inc.

Bio-Medical Applications of Troy, Inc.

Bio-Medical Applications of Tyler, Inc.

Bio-Medical Applications of Ukiah, Inc.

Bio-Medical Applications of Uniontown, Inc.

Bio-Medical Applications of Uvalde, Inc.

Bio-Medical Applications of Vero Beach, Inc.

Bio-Medical Applications of Victoria, Inc.

Bio-Medical Applications of Waco, Inc.

Bio-Medical Applications of Warner Robins, Inc.

Bio-Medical Applications of Washington, Inc.

Bio-Medical Applications of Weslaco, Inc.

Bio-Medical Applications of West Forth Worth, Inc.

Bio-Medical Applications of West Houston, Inc.

Bio-Medical Applications of West Louisville, Inc.

Bio-Medical Applications of Western Pennsylvania, Inc.

Bio-Medical Applications of Westwood, Inc.

Bio-Medical Applications of Wharton, Inc.

Bio-Medical Applications of Whittier, Inc.

Bio-Medical Applications of Wichita Falls, Inc.

Bio-Medical Applications of Wilkes Barre, Inc.

Bio-Medical Applications of Woonsocket, Inc.

Blue Ridge Medical Supply, Inc.

BMA International, Inc.

Cox Marketing, Inc.

Creative Food 'N Fun Company

Creative Restaurant Concepts, Inc.

De Zaan, Incorporated

Del Taco Corporation

Del Taco Restaurants, Inc.

Dialysis Assistance, Inc.

Dialysis Institute of Indiana, Inc.

Dialysis Services, Inc.

Erika, Inc.

Erika International Sales Corporation

Erika of Texas, Inc.

Fayetteville Kidney Center, Inc.

Foster Medical InfusionCare, Inc.

FRD Medical Applications, Inc.

G/B Cocoa Holding Inc.

Grace Cocoa, Inc.

Grace Washington, Inc.

W.R. Grace & Co.

Greater Southeast Community Center for Renal Disease, Inc.

Gulf Region Mobile Dialysis, Inc.

Huntsville Dialysis Center, Inc.

InfusionCare, Inc.

InfusionCare of New York, Inc.

Lakeworth/Boynton Community Dialysis Center, Inc.

Life Assist Medical Products Corp.

Lifechem, Inc.

Macon Dialysis Facility, Inc.

Medical Accountability Group, Inc.

Medical Supply Company, Inc.

Medtech, Inc.

Medtech of Kansas, Inc.

Medtech Respiratory Products of Arizona, Inc.

Med-X-Press, Inc.

National Medical Care, Inc.

National Medical Care Home Care Division, Inc.

National Medical Care of Spain, S.A.

Nephrology Associates, Inc.

NMC Leasing, Inc.

North Alabama Nephrology Center, Inc.

North Suburban Nephrology Associates, Ltd.

Northern Virginia Dialysis Center, Inc.

Renal Care Centers Corporation

Renal Disease, Inc.

Renal Scientific Service, Inc.

Renal Scientific Service of Texas, Inc.

Renal Supply Corporation

Rockwood Dialysis Center, Inc.

Santa Barbara Community Dialysis Center, Inc.

Scottsboro Dialysis Center, Inc.

Security Health Services, Inc.

Sun City Renal Dialysis Center, Inc.

Tappahannock Dialysis Center, Inc.

The Louis J. Kolodner Dialysis Unit, Inc.

Theranutrix, Inc.

Valley Hemodialysis Center, Inc.

Vital Care, Inc.

Warrenton Dialysis Center, Inc.

West End Dialysis Center, Inc.

Dartmouth Insurance Company, Ltd.

NMC Holdings, Ltd.

Erika Laboratories, Ltd.

Kascho, Kakao-und Schokoladenwerke, G.m.b.H.

Vertriebsgesellschaft der Cacaofabriek De Zaan B.V.m.b.H.

Verwaltungsgesellschaft KASCHO Import-Export G.m.b.H.

Erika de Reynosa

Berisford Cacao, N.V.

Cacao De Zaan B.V.

Twincon B.V.

NMC-Centro Medico Nacional, LOA

De Zaan Far East Pte. Ltd.

Instituto Ciencias Neurologicas

Grace Cocoa (a Delaware partnership)

Grace Ventures Partnership One (a California partnership)

Kascho Import-Export G.m.b.H. & Co. K.G. (a German partnership)

APPENDIX B

No. 88-266

IN THE SUPREME COURT OF THE STATE OF MONTANA

1989

W. R. GRACE & COMPANY,
a corporation,

Petitioner and Appellant,

-vs-

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,

Defendants and Respondents.

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis & Clark, The Honorable Henry Loble, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

George T. Bennett argued; Helena, Montana
Paul H. Frankel argued; Morrison & Foerster, New York, New York
Terry B. Cosgrove argued; Luxan & Murfitt, Helena, Montana

For Respondent:

Paul Van Tricht argued; Tax Counsel, Dept. of Revenue, Helena, Montana

For Amicus Curiae:

Bruce W. Moerer; Montana School Boards Assoc., Helena, Montana

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Submitted: April 6, 1989
Decided: August 18, 1989

Filed:

/s/ Ed Smith

Clerk

Mr. Justice William E. Hunt, Sr., delivered the Opinion of the Court.

W. R. Grace & Company appeals from an order of the District Court of the First Judicial District, Lewis and Clark County, upholding a ruling by the State Tax Appeal Board (STAB), which denied certain deductions claimed by Grace on its net proceeds of mines tax returns for the years 1977, 1978 and 1979. We affirm.

The following issues are raised on appeal:

1. Did the District Court err in holding that STAB properly disallowed certain deductions in the calculation of Grace's net proceeds taxes?

2. Did the Department of Revenue (Department) complete its deficiency assessment of Grace's 1977 and 1978 net proceeds taxes within the time allowed by law?

W. R. Grace & Company, a Connecticut corporation, owns and operates a vermiculite mine and related plant and facilities on Vermiculite Mountain, located in Lincoln County near the Kootenai River, approximately nine miles northeast of Libby. Vermiculite is a micaceous mineral, which must be expanded before being used in various construction materials.

After the vermiculite ore is extracted from an open pit mine on Vermiculite Mountain, it is transported to a "transfer point" and, from there, into mine processing facilities. Processing carries the mineral through a storage and blending facility into a wet mill, then through a dry screen plant to a sized product storage facility, bordering the Kootenai River. From that point, a conveyor transports most of the unexpanded mineral across the Kootenai to rail-loading facilities adjacent to the Burlington Northern railroad tracks, where it is loaded in bulk onto rail cars. A small portion of the ore is hauled to separate facilities in Libby, owned and operated by Grace, where it is bagged and loaded onto rail cars. The unexpanded vermiculite is shipped FOB from these two points to expanding plants owned by

Grace – none of which are located in Montana – or to expanding plants owned by third parties.

Grace maintains offices at both the mine site and the town of Libby. Personnel in the Libby office perform various administrative functions, e.g., accounting, procurement and payroll. A manager and assistant manager, who supervise the Libby employees as well as the employees working at the mine and milling facilities, also maintain an office in Libby.

The Montana facilities are part of Grace's Construction Products Division (CPD), located in Cambridge, Massachusetts, separate from Grace's corporate headquarters. The CPD manufactures and markets numerous commercial products for the construction and agricultural industries. It operates over one-half dozen plants in Canada and over 40 in the United States, although its only Montana plant is the mine and mill site on Vermiculite Mountain.

Grace timely filed its net proceeds of mines tax returns for the years 1977, 1978 and 1979. On the returns, Grace deducted the entire cost of the Vermiculite Mountain facilities and the Libby office. It also deducted a portion of the expenses incurred by the CPD in Cambridge.

The Department conducted an audit of the returns and concluded, among other things, that deductions for expenses incurred by the Libby and Cambridge offices were improper. Therefore, by letter dated August 7, 1981, the Department issued a proposed deficiency assessment. When an acceptable resolution of the issues could not be reached through assessment revision conferences between the parties, the Department issued final notice of deficiency. Grace timely appealed the final decision to STAB.

After a hearing, STAB ruled that the majority of the expenses were not properly deducted as they were either:

1) not an actual cost of extracting the vermiculite;

2) incurred by employees not actually engaged in working or superintending the mine;

3) incurred past the point of beneficiation; or

4) not properly prorated between the Libby office and the plant facilities.

STAB did conclude, however, that a portion of the expenses were properly deducted. These included:

1) expenses incurred in activities related to the safety of the mine, whether incurred in Cambridge or on Vermiculite Mountain;

2) salary and benefits for the two managers who maintained offices in Libby because they were actually engaged in superintending the mine;

3) salary of the chief geologist because he was actually engaged in working the mine; and

4) legal and consulting fees for filing water rights claims and obtaining patents.

On June 11, 1987, Grace filed a petition for judicial review with the First Judicial District Court, Lewis and Clark County. The Department filed a cross-petition. The District Court upheld the STAB ruling in its entirety. Grace appeals from the District Court determination. The Department does not cross-appeal.

The standard of review governing appeals of administrative rulings, including those made by STAB, is codified at § 2-4-704, MCA. Department of Revenue v. Davidson Cattle Co. (1980), 190 Mont. 326, 330, 620 P.2d 1232, 1234-35. The standard is delineated as follows:

> (1) The review shall be conducted by the court without a jury and shall be confined to the record.
>
> . . .

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (g) because findings of fact, upon issues essential to the decision, were not made although requested.

Section 2-4-704, MCA.

The statute sets out two basic standards. One, findings of fact will be upheld unless they are clearly erroneous, and two, conclusions of law will be upheld unless they constitute an abuse of discretion. Swan Corp. v. Montana Dept. of Revenue (Mont. 1988), 755 P.2d 1388, 1389-90, 45 St.Rep. 998, 1000; City of Billings v. Billings Firefighters Local No. 521 (1982), 200 Mont. 421, 430-31, 651 P.2d 627, 632.

Neither party contests the valuation of the deductions declared by Grace nor whether Grace actually incurred the expenses claimed. Therefore, the question raised by Grace's first issue—

whether the deductions are statutorily permissible – involves only a question of law. Likewise, the second issue presented for review – whether the deficiency assessment is barred by the statute of limitations – involves solely a question of law. Thus, we will use the broader "abuse of discretion" standard in our analysis of both issues.

I

Did the District Court err in holding the STAB properly disallowed certain deductions in the calculation of Grace's net proceeds of mines taxes?

The net proceeds of mines tax has been a part of the property tax scheme of Montana since 1864, preceding statehood itself. Faced with the difficulty of accurately measuring the value of undeveloped minerals in place, the territorial legislature adopted the net proceeds tax as a substitute for an *ad valorem* tax on the value of mines or mining interests. See Byrne v. Fulton Oil Co. (1929), 85 Mont. 329, 334, 278 P. 514, 517. The framers of the first state constitution incorporated the tax into that document at article XII, section 3. The current tax was separately codified in 1921 and, with the exception of some minor variations, the tax remains much as it was at that time. The 1972 Constitutional Convention eliminated the 1889 constitutional provision for the tax from the present constitution.

The tax is centrally assessed by the Department. Section 15-23-101, MCA. The producer or operator of the mine annually reports, on a form provided by the Department, the gross yield of the mineral, as well as various costs incurred in the mining process. Section 15-23-502, MCA. From the returns, the Department calculates the net proceeds of the mine by subtracting certain expenses from the value of the gross product. Section 15-23-503, MCA. The Department then transmits the assessed value of the net proceeds to the county assessor, who records the value in the assessment book as class one property. Sections 15-23-106 and 15-6-131, MCA.

At issue in this case is the deductibility of certain expenses claimed by Grace on its net proceeds returns. Section 15-23-502,

MCA (1977), the statute in effect during the years in controversy, enumerates costs a taxpayer may declare on its net proceeds tax statement, including the following:

> (6) cost of extracting from the mine;
>
> (7) cost of transporting to place of reduction or sale;
>
> (8) cost of reduction or sale;
>
> (9) cost of marketing the product and conversion of same into money;
>
> (10) cost of construction, repairs, and betterments of mines and cost of repairs and replacements of reduction works;
>
> . . .
>
> (12) cost of fire insurance and workers' compensation insurance.

Section 15-23-502, MCA (1977), is read in conjunction with § 15-23-503, MCA (1977). The latter statute lists the items the Department subtracts from gross value to arrive at net proceeds, including:

> (b) all moneys expended for necessary labor, machinery, and supplies needed and used in the mining operations and developments;
>
> (c) all moneys expended for improvements, repairs, and betterments necessary in and about the working of the mine, except as hereinafter provided;
>
> (d) all moneys expended for costs of repairs and replacements of the milling and reduction works used in connection with the mine;
>
> . . .

> (f) all moneys actually expended for transporting the ores and mineral products or deposits from the mines to the mill or reduction works or to the place of sale and for extracting the metals and minerals therefrom and for marketing the product and the conversion of the same into money;
>
> (g) all moneys expended for fire insurance and workers' compensation insurance and for payments by mine operators to welfare and retirement funds when provided for in wage contracts between mine operators and employees.

Section 15-23-503(1), MCA (1977). The statute goes on to restrict the allowable deductions in the following manner:

> (4) No moneys invested in the mines and improvements during any year except the year for which such statement is made and except as provided in this section may be included in such expenditures, and such expenditures may not include the salaries or any portion thereof of any person or officer not actually engaged in the working of the mine or superintending the management thereof.

Section 15-23-503(4), MCA (1977).

Grace maintains that § 15-23-503, MCA (1977), allows the deduction of all costs related to the vermiculite mine as long as they are *necessary* to the mining operation. Therefore, Grace argues, all general overhead, office and administrative expenses attributable to the mining process for which it has properly accounted are deductible, whether incurred at the mine site, Libby or Cambridge.

Grace reads the statute too broadly. The law does not permit the deduction of "every conceivable item of expense." Anaconda Copper Mining Co. v. Junod (1924), 71 Mont. 132, 140, 227 P. 1001, 1004. The net proceeds tax is not an income tax. It is a property tax. Its purpose is to arrive at a fair valuation of mining interests by using net proceeds as a proxy for the

value of the mine itself. *Byrne*, 85 Mont. at 334, 278 P. at 517. Therefore, what may be properly deducted from net proceeds is construed restrictively. Only the direct costs and expenses of extracting the mineral are deductible. *Anaconda*, 71 Mont. at 138, 227 P. at 1004.

Certainly, overhead and administrative expenses incurred by the Cambridge and Libby offices are necessary in the sense that they contribute to the smooth functioning of the vermiculite mine. However, they are not necessary in the sense contemplated by the net proceeds tax. Overhead, office and administrative expenses, while properly deductible for arriving at taxable income, are not properly deductible for determining the value of this taxable property. Not only must expenses be needed and used in the mining operation before they may be deducted from net proceeds, they must also be a direct cost of extracting the mineral.

In addition, subsection (4) of § 15-23-503, MCA (1977), specifically provides that deductions shall not include "the salaries or any portion thereof of any person or officer not actually engaged in the working of the mine or superintending the management thereof." Many of the expenses Grace seeks to deduct are salaries of personnel who are not working or superintending the mine, e.g., accountants, systems analysts, financial planners and lawyers. While we do not doubt that these individuals are important to the mining operation, the statute simply does not allow the deduction of their salaries.

Grace relies on our decision in Cyprus Mines Corp. v. Madison County (1977), 172 Mont. 116, 560 P.2d 1342, for the proposition that necessary overhead, office and administrative expenses are deductible as long as the taxpayer uses a proper cost accounting system. Indeed, in *Cyprus Mines*, we denied the taxpayer's claims due to an improper method of allocating costs. However, the opinion does not stand for the proposition that a proper cost accounting system turns otherwise nondeductible expenditures into deductible expenditures. Before the items at issue may be subtracted from gross value to arrive at net proceeds, they must be needed and used in the mining operation as a direct cost of

extracting the mineral. General overhead, office and administrative expenses are indirect costs, and, as such are not deductible – regardless of the accounting system employed by the taxpayer.

Our opinion today does not abrogate the general principle of *Cyprus Mines*. Expenses that are improperly accounted for will not be permitted. Thus, STAB did not abuse its discretion in concluding that computer use, electricity, telephone and transportation costs were not deductible because they were improperly prorated between the mine site and the Libby office.

Grace also contests STAB's failure to allow deductions for transporting and marketing the mine product. STAB disallowed these expenses because it found that they were incurred beyond the point of beneficiation.

Section 15-23-503(1)(f), MCA (1977), provides for the deduction of costs incurred in transporting the mineral from the "mines to the mill or reduction works or to the place of sale and for extracting the metals and minerals therefrom and for marketing the product and the conversion of the same into money." However, in Pfizer, Inc. v. Madison County (1973), 161 Mont. 261, 505 P.2d 399, we limited the deductions allowed by this subsection. In *Pfizer*, we rejected the State Board of Equalization's contention that the net proceeds tax extends all the way through the mining process to the point where the product is marketed, sold and converted into money. Instead, we held that the net proceeds tax applies only to the mining stage of the operation. Once the mineral passes the beneficiation stage – the pre-manufacturing phase of the mining process – the net proceeds tax no longer applies. Value added to the mineral from operations undertaken beyond the point of beneficiation is not included in the value of net proceeds. Therefore, deductions from such operations are not allowed.

> Where the net proceeds tax ends, there also ends the deductions for such tax. Only deductions for the mining operation will be allowed up through the beneficiation stage. All other expenses will be incurred as to the manufacturing process.

Pfizer, 161 Mont. at 267, 505 P.2d at 402.

Grace points out that our affirmance of the STAB decision may result in some inconsistent applications of the law. For example, STAB permitted deductions for costs associated with the safety of the miners even though these expenses were incurred by personnel who were not directly engaged in working or superintending the mine. Any inconsistencies, however, may be attributed to the fact that the Department did not appeal the STAB decision to this Court. Whether STAB properly permitted deductions for costs associated with the safety of the miners is not in issue here and we will not attempt to address the question.

With regard to the issues that have been properly raised on appeal, we find that STAB did not abuse its discretion. Statutes and case law do not permit the expenses Grace sought to deduct on its net proceeds of mines tax returns.

II

Did the Department complete its deficiency assessment of Grace's 1977 and 1978 net proceeds taxes within the time allowed by law?

By letter dated August 7, 1981, the Department issued its deficiency assessment of Grace's 1977, 1978 and 1979 taxes. Grace argues that, because the Department did not complete the assessment of the 1977 and 1978 taxes until more than two years after the returns were due, it was barred by the statute of limitations from pursuing any deficiencies in net proceeds taxes for these years. Grace does not raise the statute of limitations issue with regard to the 1979 taxes because the Department issued the deficiency assessment within two years after that return was filed.

Grace relies on Caterpillar Tractor Co. v. Department of Revenue (Mont. 1981), 633 P.2d 618, 38 St.Rep. 1245, to support its argument that a two-year statute of limitations applies to deficiency assessments of net proceeds taxes. In *Caterpillar*, we held that, in the absence of a specific statute of limitations

governing the particular tax in question, the general two-year limitations period prescribed in § 27-2-211(1)(c), MCA, for a liability created by statute other than a penalty or forfeiture applied.

The tax examined in *Caterpillar*, however, differs from the tax in question here. In *Caterpillar*, we considered the corporation license tax, which is a self-assessing tax on corporate income. The tax in issue in this case, on the other hand, is the net proceeds of mines tax, which is a centrally assessed tax on property. Prior to 1983, the limitations period for assessment revisions of property taxes, including the net proceeds of mines tax, was found at § 15-8-601, MCA. Because a specific statute of limitations governed the mines net proceeds tax during the years in question, the two-year limitations period found in § 27-2-211(1)(c), MCA, does not control this case.

Section 15-8-601, MCA, provides as follows:

> (1) Whenever the department of revenue discovers that any taxable property of any person has in any year escaped assessment, been erroneously assessed, or been omitted from taxation, the department may assess the same provided the property is under the ownership or control of the same person who owned or controlled if at the time it escaped assessment, was erroneously assessed, or was omitted from taxation. All such revised assessments must be made within 10 years after the end of the calendar year in which the original assessment was or should have been made.

The statute sets out two prerequisites. The factual situation must involve taxable property that has "escaped assessment, been erroneously assessed, or been omitted from taxation;" and, the property sought to be assessed must remain "under the ownership or control of the same person who owned or controlled it at the time it escaped assessment, was erroneously assessed, or was omitted from taxation." The circumstances of this case fulfill both conditions.

First, taxable property owned by Grace was omitted from taxation when Grace claimed statutorily impermissible deductions on its net proceeds of mines tax returns. In Butte & Superior Mining Co. v. McIntyre (1924), 71 Mont. 254, 229 P. 730, we noted that unlawful deductions taken by the taxpayer on its net proceeds of mines returns resulted in property omitted from taxation within the meaning of a predecessor to the present § 15-8-601, MCA. Here too, we hold that unlawful deductions claimed by a taxpayer on its net proceeds of mines tax returns allows taxable property to be omitted from taxation within the meaning of § 15-8-601, MCA.

Second, even though it had sold the vermiculite ore mined in 1977 and 1978 by the time the Department completed its deficiency assessment, Grace retained ownership and control of the property subject to taxation. This is because the "taxable property" contemplated by the statute is the mine itself. As we stated earlier, the net proceeds tax is an attempt to place an accurate fair market value upon the mine. The tax "is simply a tax in lieu of, or as a substitute for, [an] *ad valorem* tax on the value of mines or mining interests." *Byrne*, 85 Mont. at 334, 278 P. at 517. The tax measures the value of the mine itself, not merely the value of the extracted minerals. Therefore, as long as Grace owns the vermiculite mine, it retains control of taxable property subject to the ten-year limitations period for reassessment under § 15-8-601, MCA.

Grace also argues that the legislature's enactment of § 15-23-116, MCA, a comprehensive five-year statute of limitations for centrally assessed property, impliedly repealed the ten-year limitations period provided in § 15-8-601, MCA.

This Court looks disfavorably upon repeals by implication. State ex rel. Sol v. Bakker (1982), 199 Mont. 385, 392, 649 P.2d 456, 460. Without an express declaration by the legislature that an enactment repeals an existing law, a later statute will not repeal an earlier law unless the two are "plainly and irreconcilably repugnant to or in conflict with each other. . ." Johnson v. Marias River Electric Coop. (1984), 211 Mont. 518, 523, 687 P.2d 668, 671.

The legislature did not adopt the five-year statute, § 15-23-116, MCA, until 1983. The statute was made retroactive to taxes due after December 31, 1980. Act of March 23, 1983, ch. 194, § 3, 1983 Mont. Laws 389. The tax years at issue in this case, however, are 1977 and 1978. Therefore, even if the statutes are repugnant to each other, a question we will not consider at this time, they cannot possibly conflict prior to 1981, as the five-year statute of limitations had no force or effect prior to that year. With regard to the 1977 and 1978 tax years, Grace's argument that § 15-23-116, MCA, impliedly repealed § 15-8-601, MCA, is without merit.

A ten-year statute of limitations governed the reassessment of Grace's net proceeds taxes for the years 1977 and 1978. Therefore, when the Department issued its deficiency assessment in 1981, it did so within the time allowed by law.

Affirmed.

/s/ William E. Hunt, Sr.
Justice

We Concur:

/s/ J. A. Turnage
Chief Justice

/s/John Conway Harrison

/s/L. C. Gulbrandson

/s/ Fred J. Weber

/s/ John C. Sheehy

/s/ R. C. McDonough
Justices

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 88-266

W. R. GRACE & CO.,
a corporation,

Petitioner and Appellant,

v.) ORDER

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,

Defendants and Respondents.

The petition for rehearing and the amended petition for rehearing are denied.

DATED this 14th day of September, 1989.

/s/ J. A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ R. C. McDonough

/s/ William E. Hunt, Sr.

/s/ Fred J. Weber

/s/ John C. Sheehy
Justices

Honorable L. C. Gulbrandson, Retired Justice, would also deny the petitions.

APPENDIX D

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

W. R. GRACE & CO., a corporation,	)	
	)	
Petitioner,	)	Cause No. ADV-87-610
—vs—	)	
DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and the STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,	)	ORDER
Respondents.	)	

On June 11, 1987, the Petitioner, W. R. Grace and Co., a corporation, filed herein its petition for judicial review of final decision of the State Tax Appeal Board (STAB). The petition was filed under and pursuant to the Montana Administrative Procedure Act, Sections 2-4-701 through 2-4-711, and Section 15-2-303, MCA. Annexed to the petition as Exhibit A was a copy of STAB's forty-one page findings of fact, conclusions of law, order and notice of opportunity for judicial review made under date of April 21, 1987. Two members of STAB signed the order and one member dissented in part. The petition for judicial review asks that this Court reverse the decision of STAB and find and determine as follows:

(a) The DOR has no jurisdiction, right, or authority to assert deficiency assessments for the taxable years 1977 and 1978, and/or that said years are barred by applicable statute of limitations; and

(b) That all of the expenses deducted by Petitioner are properly allowable under the tax in issue.

In its response filed on July 6, 1987, the Department of Revenue of the State of Montana (DOR) cross-petitioned and asked that the order of STAB be modified by the Court to not allow the deduction of certain expenses which STAB had allowed to Petitioner in computing the net proceeds tax on Petitioner's vermiculite mine near Libby, Montana.

A briefing schedule was established by the Court, and briefs were filed in compliance therewith. Amicus curiae briefs were filed by Beaverhead County, Montana; the Montana Power Company; the Montana School Boards Association; and Blaine County, Montana. Petitioner Grace and Defendant DOR submitted proposed findings of fact and conclusions of law. For purposes of review, STAB certified a stipulated shortened administrative record. Section 2-4-702(4), MCA.

The Court has reviewed the entire record, the briefs, the proposed findings of fact and conclusions of law, and each and all of the papers, records, files, and documents.

This Court's standards for review are as set forth in Section 2-4-704, MCA, as follows:

> (1) The review shall be conducted by the court without a jury and *shall be confined to the record.* . . .
>
> (2) The court *may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.* The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(g) because findings of fact, upon issues essential to the decision, were not made although requested. (Emphasis supplied)

In this case, the Court sits solely as a reviewing body. Neither party moved for the submission of additional evidence pursuant to Section 15-2-303(4), MCA. These proceedings are not a *de novo* trial.

> Case law has clarified the standards of review set out in section 2-4-704, MCA. Findings of fact by an agency are binding on the court "if there is substantial, credible evidence in the record." City of Billings v. Billings Firefighters Local No. 521 (Mont. 1982), 651 P.2d 627, 632, 39 St. Rep. 1844, 1849. There is a broader scope of review on legal questions. "Where the intent of statutes is unclear, deference will be given to the agency's interpretation . . . Where it appears that the legislative intent is clearly contrary to agency interpretation, the court will not hesitate to reverse on the basis of 'abuse of discretion.' " (Citations omitted.) City of Billings v. Billings Firefighters Local No. 521, 651 P.2d at 632. Appellants have the burden of showing their rights were substantially prejudiced by an arbitrary or capricious or clearly erroneous agency decision. City of Billings v. Montana Human Rights Commission (Mont. 1984), 681 P.2d 33, 39, 41 St. Rep. 688, 696.

Carruthers v. Board of Horse Racing, 700 P.2d 179, 181, 42 St. Rep. 729, 732 (1985)

In *Harris v. Bauer*, ____ Mont. ____, 45 St. Rep. 147, 151 (Jan. 19, 1988), it is said:

> In Johnson v. Bozeman School District No. 7 (Mont. 1987), 734 P.2d 209, 211, 211-212, 44 St. Rep. 531, 534, this Court held:
>
> "Findings of fact by an administrative agency are subject to the 'clearly erroneous' standard of review. However, conclusions of law are subject to the 'abuse of discretion' standard of review, where the scope is broader."

The issues presented to this Court for review are set forth by the Petitioner on page 2 of its opening brief as follows:

> (a) That portion of the decision whereby STAB found and determined that the tax in issue for the taxable years 1977 and 1978 was not barred by applicable statute of limitations, and that the Department of Revenue had the jurisdiction and authority to assess the applicable tax notwithstanding the passage of time as hereinafter more particularly alleged; and
>
> (b) That portion of the decision whereby deductions were disallowed by the final decision of STAB as hereinafter more particularly alleged.

The issues as set forth by DOR in its proposed findings of fact and conclusions of law are as follows:

ISSUES

> This case involves the Mines Net Proceeds Tax, §§ 15-23-501 through 15-23-523, MCA, 1979, and presents two general issues:

1) What expenses of Grace are allowed as deductions from the gross value of the minerals which Grace produced from its mine during the years in controversy to determine the taxable net proceeds? [Footnote omitted]

2) Does a statute of limitation bar the Department's assessment for calendar/production years 1977 and 1978?

(Grace conceded the assessment for calendar/production year 1979 was not subject to a statute of limitation defense.)

The issue concerning the statute of limitations is a question of law. To reverse on this ground, the Court must find an "abuse of discretion" on the part of STAB. This issue was decided by STAB in its order of April 21, 1987 in conclusions of law 1-6 inclusive. This Court finds and determines that the decision made by STAB on this issue was well-reasoned, not an "abuse of discretion" and therefore must be affirmed by this Court. Petitioner, in seeking a reversal of STAB on this question of law, relies almost entirely upon legislative history. It is not necessary, in this case, for the Court to enter the thicket of legislative history. The intent of the statutes involved here, Sections 15-23-116, MCA, and 15-8-601, MCA, can be determined from their contents. They plainly mean as STAB finds their meaning to be in the order from which this appeal is taken. Where the language of a statute is plain, unambiguous, direct, and certain, the statute will speak for itself and there is no need for the court to engage in statutory construction. *Missoula Rural Fire District v. Missoula County*, 720 P.2d 1170, 43 St. Rep. 1153 (1986), citing *State v. Hubbard*, 649 P.2d 1331, 39 St. Rep. 1608 (1982). Although some of the statements in the legislative history appear to support Petitioner's contentions others do not. It would be a mistake to decide this case on the basis of conflicting statements made by individual legislators, state officials, and lobbyists before legislative committees. As STAB has determined, the case can be decided upon the basis of the plain wording of the laws in question.

The other issue concerns STAB's disallowance of Petitioner's deductions when STAB determined the tax on Petitioner's net proceeds. This is largely a question of fact, since the law governing determination of net proceeds tax is reasonably clear and needs no statutory construction. *See* Sections 15-23-502 and 15-23-503, MCA. In addition, the Montana Supreme Court, in considering the net proceeds tax, has said: "A general rule of taxation is that an item may serve as a deduction *only when the legislature specifically establishes the deduction.* [Citation omitted] A revenue statute allowing a deduction should be construed with *specificity,* as opposed to the rule of liberal construction which generally applies to revenue laws." (Emphasis supplied) *Cyprus Mines Corp. v. Madison County,* 172 Mont. 116, 118, 560 P.2d 1342, 1343 (1977).

In *Anaconda Copper Mining Co. v. Junod,* 71 Mont. 132, 138-140, 227 P. 1001, 1004 (1924), the supreme court said: "It was the aim and intention of the Legislature to fix some definite and uniform basis for the determination of net proceeds of mines for taxation purposes. This it has done by authorizing deductions of only *actual costs. It was not its intention to permit deduction of every conceivable item of expense.*" (Emphasis supplied)

Moreover, as a general rule, allowance of deductions to a taxpayer does not turn on generally equitable considerations but depends upon legislative grace. *Deputy v. DuPont,* 308 U.S. 488, 493 (1939), citing *New Colonial Ice Co. v. Helvering,* 292 U.S. 435, 440 (1933). There must be a clear statutory provision before a particular deduction may be allowed. *Id.* Petitioner Grace appears to concede that the burden is upon the taxpayer to prove that the costs and expenses were actually incurred in order to be deductible (see page 39 of Petitioner's Proposed Findings of Fact, Conclusions of Law and Judgment).

The findings of fact of STAB on the question of the deductions are based upon "substantial, credible evidence" and will not be disturbed by this Court. STAB did not "abuse its discretion" in adopting conclusions of law relative to the deductions. Consequently, the decision of STAB on the issue of deductions is

AFFIRMED both as to the petition of Grace and the cross-petition of DOR.

STAB's decision of April 21, 1987, is affirmed in its entirety, and the petition of Grace and the cross-petition of DOR are, and each of them are, DISMISSED.

DATED this 4th day of March, 1988.

/s/ Henry Loble
DISTRICT JUDGE

pc: Paul Van Tricht
George Bennett
Paul Franklin [sic]
Michael E. Zimmerman

APPENDIX E

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

W. R. GRACE & CO., a corporation,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	Cause No. ADV-87-610
DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,	)	ORDER RE PETITION FOR REHEARING
	)	
Respondents.	)	

On March 11, 1988, Petitioner W. R. Grace & Co. filed a "Motion for Rehearing and Redetermination" of this Court's order and decision dated March 4, 1988. Final judgment was entered by order of the Court on March 16, 1988. Department of Revenue (DOR) filed its reply brief to Petitioner's motion on March 17, 1988; Petitioner filed a closing memorandum and notice of submission of the matter March 25, 1988. Having been fully briefed, the matter is now submitted for decision.

The first issue raised in the briefs is whether this Court has jurisdiction to hear a petition for rehearing. Under Rule 60(b)(6), M.R.Civ.P., a court may "on motion and upon such terms as are just," relieve a party from an order or final judgment for any reason "justifying relief from the operation of the judgment." The Court therefore holds it has jurisdiction to hear the petition.

Petitioner requests rehearing on three grounds 1) the Court applied incorrect standards of review to the case; 2) the Court failed to adopt the proposed findings of fact and conclusions of law submitted by the parties; 3) the Court committed clear

error of law in affirming the State Tax Appeal Board's (STAB) disallowance of certain deductions and STAB's decision on the statute of limitations issue.

In its order of March 4, 1988, the Court applied the standards of review of an administrative action which are set forth in Section 2-4-704, MCA, and which have been approved by the Montana Supreme Court in *Carruthers v. Board of Horse Racing*, 700 P.2d 179, 42 St.Rep. 729 (Mont. 1985) and *Harris v. Bauer*, 749 P.2d 1068, 45 St.Rep. 147 (Mont. 1988). Petitioner has cited no authority to demonstrate different standards of review apply in judicial review of contested cases under MAPA. While conceding the Montana Supreme Court has stated that conclusions of law of an administrative agency are subject to the "abuse of discretion" standard, Petitioner argues this is a "non-rule," and that STAB has misinterpreted the applicable statutes and thus "abused its discretion." The Court finds no merit in this contention. As stated in the order of March 4, 1988, STAB's findings of fact were supported by substantial credible evidence in the record, and STAB's conclusions of law based on the findings of fact were not an abuse of discretion. The party challenging the agency's decision bears the burden of proof showing his or her rights were substantially prejudiced by an arbitrary, capricious or clearly erroneous agency decision; Petitioner in this case did not meet its burden of proof.

Petitioner's second contention is that the Court erred in failing to enter the findings of fact and conclusions of law proposed by Petitioner. A petition for judicial review is an appellate proceeding whereby the district court reviews the decisions of lower administrative tribunals.

> Actions in which the district court reviews the decisions of administrative agencies are governed by the applicable statutes and not by Rule 52. Thus, if the district court does not try the facts but is limited to a review of the findings of the agency, the court may not make findings of fact. The findings of the administrative agency are not governed by the provisions

> of Rule 52 concerning the form of findings, or the setting aside of findings not clearly erroneous.

9 Wright and Miller, *Federal Practice and Procedure*, Section 2573 at 687 (1971).

In affirming the decision of STAB, the Court specifically found the conclusions of law were "well-reasoned" and based on findings of fact which were supported by "substantial, credible evidence." Order of March 4, 1988 at 5 and 8. The Court approved the reasoning of STAB's decision, which reasoning should give Petitioner adequate grounds for appeal.

Finally, Petitioner argues the Court committed clear error of law in affirming STAB's decision. Specifically, Petitioner argues DOR's disallowance of certain clerical and office expenses is reversible error because DOR has an administrative regulation which allows clerical and office expenses "to the extent that they relate to the actual production of the product." ARM Section 42.22.1217, amended and transferred to ARM Section 42.25.1017 (12/31/86). The record discloses DOR allowed office and clerical expenses at the mine/mill office where actual production of the vermiculite took place; DOR did not allow certain administrative expenses for the Libby, Montana, or Cambridge, Massachusetts offices. This separation of expenses by DOR is not an arbitrary or capricious interpretation of ARM Section 42.22.1217, and it is not the function of this Court to promulgate administrative regulations as to which specific expenses may be deducted. Since the general rule of law is that a revenue statute allowing a deduction should be construed with specificity, DOR's interpretation of ARM Section 42.22.1217 is not an abuse of discretion.

Therefore, Petitioner's petition for rehearing is DENIED and the Court's order of March 4, 1988 is AFFIRMED.

DATED this 1st day of June, 1988.

/s/ Henry Loble

DISTRICT JUDGE

pc: George T. Bennett
Paul Van Tricht
Paul Franklin [sic]

APPENDIX F

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

W.R. GRACE & CO., a corporation,	)	
	)	
Petitioner,	)	No. MT-1983-9
	)	
—vs—	)	
	)	
DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,	)	
	)	
	)	
Respondent.	)	

* * * * * *

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, AND NOTICE OF OPPORTUNITY FOR JUDICIAL REVIEW

The above-entitled cause regularly came on for hearing on November 3, 4, and 5, 1986, in Helena, Montana. Testimony and evidence were taken and briefs were submitted by both parties. The State Tax Appeal Board (hereinafter "Board"), having fully considered the testimony, evidence, and record, and being fully advised, finds, concludes, and orders the following.

The tax involved in this case is the Mines Net Proceeds Tax, §§ 15-23-501 through 15-23-523, MCA (1979). The years in controversy are calendar/production years 1977, 1978, and 1979 (hereinafter "the years in controversy"). W.R. Grace & Co. (hereinafter "Grace") timely filed the tax returns on the net proceeds from a vermiculite mine/mill which it operated in Lincoln County, Montana, for each of the years in controversy. The Department of Revenue of the State of Montana (hereinafter "DOR") conducted an audit of Grace's net proceeds for the years in controversy and issued proposed deficiency assessments for calendar/production years 1977, 1978, and 1979 by a letter and notice dated August 7, 1981. Grace timely protested the proposed deficiency assessments. Thereafter DOR,

pursuant to § 15-8-601, MCA, held a series of assessment revision conferences with representatives of Grace. These conferences did not resolve the assessment and DOR issued a final notice of deficiency by letter dated April 18, 1983. Grace timely appealed that final decision to this Board. Prior to, during, and after the hearing, Grace and DOR entered into various joint written and oral agreements, stipulations, and unilateral concessions. The written stipulations, agreements, and concessions included:

1. A stipulation of (1) Partial Facts, (2) Statement of Issues Currently in Dispute Before the State Tax Appeal Board, and (3) Exhibits, dated November 2, 1986;

2. Stipulation on Issues Settled by the Parties, dated November 2, 1986;

3. Agreed Statement and Stipulation Covering Statute of Limitations Issues, dated November 2, 1986;

4. Agreement and Stipulation With Respect to Proprietary and Confidential Information dated November 31, 1986 [sic];

5. Post-Trial Amended Stipulation on Issues Settled by the Parties, dated December 22, 1986; and

6. The Notice of the DOR dated February 10, 1987.

Those Stipulations are incorporated by reference. If there is an explicit conflict between any portion of a Stipulation and this opinion, the Stipulation controls. This Order reduces to writing a decision rendered by the Board on February 25, 1987.

SUMMARY OF ISSUES IN DISPUTE

Grace presented the following issues or questions:

1. Does the statute of limitations bar an assessment for calendar/production years 1977 and 1978? (Grace did not allege the assessment for calendar/production year 1979 was barred by a statute of limitations.)

2. Are the disputed deductions disallowed by DOR for calendar/production years 1977, 1978, and 1979 allowable under §§ 15-23-502 and 15-23-503, MCA, because the monies involved were expended for (a) necessary labor, machinery, and supplies needed and used in the vermiculite mining operations and developments of Grace at Libby; (b) costs of repairs and replacements of the milling and reduction works used in connection with the mine; (c) transportation of the vermiculite from the mine to the mill, the reduction works, and the place of sale; (d) marketing the vermiculite; and (e) converting the vermiculite into money? That is, could the expenses still in dispute after the various agreements and concessions be deducted from the value of the gross yield of the vermiculite which Grace produced during calendar/production years 1977, 1978, and 1979?

In detail, the remaining issues in dispute were whether Grace may deduct the following expenses from the value of the gross yield of its mine/mill in determining its net proceeds:

Line No.	ITEM	YEAR 1977	1978	1979
(1)	Remodeling Libby Office	$21,748	$12,560	$ –
(2)	Strike Security Costs	–	4,928	–
(3)	Watchman Expenses	42,013	46,060	48,611
(4)	Cambridge Tech. Service	3,132	160	–
(5)	Libby Lab	–	–	–
(6)	Hauling and related costs during period river crossing conveyor inoperative	–	–	260,702
		DOR allowed		(2,500)
				258,202
	OTHER CAMBRIDGE EXPENSES DEPT. NO.			
(7)	902 Purchasing & Traffic	17,130	7,292	8,994
(8)	903 Div. Administration	34,385	43,178	22,648
(9)	905 Controllers	18,787	17,611	14,478
(10)	906 Financial Planning	28,858	24,311	35,315
(11)	907 Engineering	37,848	8,634	6,593
(12)	909 Quality Assurance	3,868	3,163	4,030

(13)	910	Systems Development	19,611	28,994	32,938
(14)	915	Library	189	296	403
(15)	916	Industrial Relations	14,855	12,461	13,064
(16)	290	Zonolite Mfg. Admin.	47,192	51,918	50,906
(17)	-	Non-departmental Exp.	15,073	17,860	2,825
(18)	109	Payroll, Insurance, Admin.	7,505	8,471	7,996
(19)	111	Legal	5,570	7,012	11,080
(20)	113	Safety, Labor Rel.	7,178	6,025	7,024
(21)	115	Cafeteria	731	897	486
(22)	116	Office Services	18,943	16,775	19,217
(23)	118	Data Input	4,343	848	932
(24)	119	Data Processing	10,702	7,995	10,326
(25)	122	ICG Systems	6,106	20,890	27,370
(26)	137	Management Sciences	3,763	22,973	22,945
(27)	138	Patent	6,050	997	1,255
(28)	-	Employee Benefit Adjustment	(30,200)	(2,115)	1,337
(29)		TOTAL OTHER CAMBRIDGE EXPENSES	$278,487	$306,486	$302,161

OTHER LIBBY EXPENSES:

(30)	Staff Payroll	$158,733	$175,775	$167,547
(31)	Employee Benefits	39,761	45,894	44,046
(32)	Indirect Labor	-	5,939	1,497
(33)	Outside Services	9,024	-	1,705
(34)	Power	2,451	2,928	3,730
(35)	Supplies	31,391	35,183	41,083
(36)	Telephone	25,335	30,988	30,991
(37)	Travel	15,899	27,991	24,659
(38)	Leased Cars	5,772	3,816	4,564
(39)	Professional Services	561	11,729	11,779
(40)	Lease Rentals	4,080	4,680	3,960
(41)	Miscellaneous	6,301	5,602	7,606
(42)	Personnel Procurement	10,920	19,014	44,341
(43)	Data Processing	-	38,383	48,502
(44)	TOTAL OTHER LIBBY EXPENSES	$310,228	$407,922	$436,010

After the hearing, DOR conceded the expenses which constituted Line No. (41), Miscellaneous, were deductible. See February 10, 1987 Notice.

FINDINGS OF FACT

1. Facts relevant to the statute of limitations issue are found in the Agreed Statement and Stipulation Covering Statute of Limitations Issue entered into by Grace and DOR on November 2, 1986, which is incorporated as part of these findings.

2. Grace was incorporated in Connecticut on June 20, 1899. It was the owner and operator of a vermiculite mine and related plant and facilities on Vermiculite Mountain in Lincoln County, Montana, about nine miles northeast of Libby, Montana, near the Kootenai River, during the years in question, 1977, 1978, and 1979. The mine included the largest known vermiculite deposit and mining/milling operation in the world. Grace has operated the mine since about 1948 and continued to operate the mine at the time of the hearing. Expanded vermiculite is used for fire proofing, soil mix, light weight concrete, insulation, and other construction materials.

3. The mine product, the vermiculite ore, after extraction, was transported (a) to a "transfer point"; (b) to an ore storage and blending facility; (c) into a wet mill for processing; (d) by "skip" to a lower ore bin; (e) to a dry screen plant; (f) to a sized product storage facility adjacent to the Kootenai River; and (g) across the Kootenai River by conveyor to rail loading facilities adjacent to the Burlington Northern railroad tracks. The vermiculite was loaded in bulk onto rail cars at that point. A small portion of the vermiculite was also transported to a separate bagging, storage, export, and special order facilities owned and operated by Grace in Libby, itself. After being put into large bags, the vermiculite was also loaded onto cars at that point. The vermiculite generally must be expanded (exfoliated) by heating before it could be commercially used as an insulating and aggregating material or as a soil conditioner. The unexpanded vermiculite produced at the Libby mine/mill was shipped from these two points to Grace's own expanding plants or expanding plants of third parties. The vermiculite was sold F.O.B. at the rail loading facilities. The gross value of the

vermiculite was determined at these two points in an unexpanded form. These points were through the beneficiation stage. Points after that in the processing of the vermiculite were "beyond the beneficiation stage."

4. Grace maintained an office in Libby, Montana, itself. This office performed various administrative functions, e.g., accounting, personnel procurement, payroll, etc. A manager and an assistant manager for the mine maintained an office in Libby. They directly supervised both employees of the Libby office, about a dozen administrative employees, and during the time in controversy, the 200 to 300 employees who worked at the mine and mill itself. Other supervisory personnel, e.g., the mill and mine supervisors, were located at the mine/mill itself. There also were offices at the mine site itself. DOR did not dispute the deduction of expenses for the facilities and employees, including the supervisors, at the mine/mill site itself, except for security and watchman expenses and the special hauling expenses (Line Nos. 2, 3, and 6). Grace deducted the entire cost of its Libby administrative office on its net proceeds tax returns for calendar/production years 1977, 1978, and 1979.

5. The Libby mine/mill was part of Grace's Construction Products Division (hereinafter "CPD"). The CPD manufactured and marketed numerous commercial products for the construction trades and agriculture in the United States and Canada, including vermiculite. In addition to the Montana vermiculite mine, CPD operated a vermiculite mine/mill near Enoree, South Carolina, and a number of manufacturing plants, including plants to expand (exfoliate) vermiculite. CPD also manufactured and sold products which did not contain vermiculite. During the years in controversy, CPD had over 40 plants in the United States and over a half dozen in Canada which employed about 1,800 to 2,000 employees. The only plant in Montana operated by CPD was the mine/mill near Libby, Montana, which did not expand the vermiculite.

6. CPD maintained an office in Cambridge, Massachusetts, which was separate from the main corporate headquarters of Grace. The Cambridge office performed various "headquarters",

or general administrative services, for the entire CPD. These services included centralized purchasing and control, financial planning, legal, data processing, and payroll functions for salaried employees. A portion of these expenses of the headquarters at Cambridge was deducted by Grace on its net proceeds tax returns for production/calendar years 1977, 1978, and 1979.

7. The deductions in dispute will be addressed as Grace submitted them in its "Issues in Dispute" and referred to by Grace's Line Nos. listed on pages 4 and 5 [47a-48a].

8. Among the expenses which Grace sought to deduct was the cost of remodeling the Libby office (Line No. 1) during 1977 and 1978. This remodeling, which was done to house a computer at the Libby office nine miles from the mine, was not an actual cost of extracting the vermiculite and involved the salaries of people not actually engaged in working the mine.

9. The production workers at the mine were organized into a union. During 1978, there was a labor dispute (a strike) at the mine. Grace hired extra guards during the strike and deducted this expense as "Strike Security Costs" (Line No. 2). During each year in controversy, Grace also deducted the normal costs of guards and watchmen at the mine itself under "Watchman Expenses" (Line No. 3). These normal guards prevented intruders from entering the mine and possibly injuring themselves and endangering the safety of the workers. The normal cost of security, "Watchman Expenses" (Line No. 3), was a measure necessary to protect the production workers' safety, and was an actual cost incurred at the mine/mill site. However, the extra "Strike Security Costs" (Line No. 2) was not necessary to protect the workers' safety and was not otherwise an actual cost of extracting the mineral.

10. Grace sought to deduct certain expenses called "Cambridge Tech. Service" (Line No. 4). Those expenses included costs for removal and monitoring tremolite at the Libby mine. Tremolite is an asbestos-like material in the vermiculite ore which possibly causes or promotes cancer in the production workers at the mine. DOR did not contest the deduction of the

expenses associated with tremolite control and testing, which were part of Cambridge Tech. Service. Of the amounts which remained in dispute, Grace agreed $1,518 in 1977 for "Free Silica Determination" was not deductible. The remaining expense under Cambridge Tech. Service was "Factory T.S. Libby", which involved $1,614 for 1977 and $160 for 1978. At the hearing it was shown that the "Factory T.S. Libby" expense also was for monitoring the impact of tremolite removal efforts in the Libby mine. As a direct expense to ensure the health of the production workers actually engaged in extracting the vermiculite, these costs could be deducted by Grace. DOR also did not contest the deduction of the expenses of "Libby Lab" (Line No. 5), since those expenses involving tremolite testing.

11. "Hauling and related costs during period river crossing conveyor inoperative" (Line No. 6) involved extra expenses which Grace incurred when a conveyor which transported the vermiculite from the screen plant across the Kootenai River to the railsiding was damaged by a railroad accident. During the time the conveyor did not work, Grace spent an extra $260,702 to transport vermiculite from the screen plant to another railroad loading site, the point of valuation. Grace was not reimbursed for these damages and expenses by the railroad. Grace carried insurance to compensate for such accidents; however, the insurance had a $100,000 deductible clause. $97,500 of the deductible was paid by a "Grace New York's" Self-insured Reserve Fund. DOR allowed deduction of the remaining $2,500 in the out-of-pocket expense of CPD. Neither the cost of the liability insurance premium nor the cost of Grace's Self-insured Reserve Fund were deductible. The payments from liability insurance were not part of the net proceeds from the mine. Grace could deduct the entire extra $260,702 cost incurred as an expense of extracting and processing the vermiculite up to the agreed point of beneficiation - the rail siding.

12. Grace deducted certain portions of the expenses of its Cambridge headquarters from the value of the gross yield of its vermiculite during each of the years in controversy. These expenses are termed "Other Cambridge Expenses" by Grace and "Cambridge G&A (General & Administrative)" by DOR. Line

Nos. (7) through (28) list these expenses. The amounts in dispute are a portion of the total expenses of each department at Cambridge based on some criteria or formula for allocating the expenses of the departments at Cambridge among the various plants and facilities of CPD. Only one of these facilities was the Libby mine. The remaining 40-odd facilities included the vermiculite mine/mill at Enoree, South Carolina, expanding plants, and other manufacturing plants. The Cambridge expenses in dispute after concessions were only for labor and supplies at the Cambridge office. A sizeable portion of the entire expense of each division and the portion of these expenses allocated by Grace to the Libby mine/mill included the salaries and benefits of employees, e.g., accountants, secretaries, lawyers, etc., in Cambridge who did not in any way work at the mine or superintend the management of the Libby mine. The amounts which were allocated to the Libby mine were based upon various criteria. The expenses of two departments, Division Administration and Zonolite Manufacturing Administration, were allocated by multiplying the division costs or a portion thereof by the ratio of Libby sales divided by total CPD sales. The allocations of the other divisions were based variously upon estimates of the employee time spent or effort spent on various activities for the Libby mine. The various individual items as identified by Grace were:

a. *Line No. (7) - Purchasing & Traffic*. This department was responsible for large purchase orders and efficient transportation of vermiculite from Libby to its expansion plants and other customers. The transportation expenses were not incurred past the agreed point of beneficiation.

b. *Line No. (8) - Div. Administration*. This department included the CPD Treasurer, the CPD Vice President of Finance and Administration, the CPD President and the CPD Credit and Collections group. None of its members were normally actually directly engaged in superintending the mine/mill itself in Montana.

c. *Line No. (9) - Controllers*. This department maintained financial and accounting records, set accounting policies and procedures, established schedules, and made required governmental financial filings.

d. *Line No. (10) - Financial Planning.* This department established criteria for purchasing capital equipment, developed the production plan for the following year, analyzed costs for the past year, estimated costs for the future, and determined a plan for operations based on anticipated future demand for vermiculite.

e. *Line No. (11) - Engineering.* This department provided electrical, chemical, and environmental expertise which was not available at Libby.

f. *Line No. (12) - Quality Assurance.* This department assured product uniformity in size, expandability, weight loss, and density of most CPD products, including vermiculite. It worked with Underwriters Testing Laboratories and the quality control workers to assure that the vermiculite shipped from South Carolina and Montana met required standards. This work also benefited the post beneficiation stage vermiculite.

g. *Line No. (13) - Systems Development.* This department developed software for all CPD computers, including computers at Libby.

h. *Line No. (14) - Library.* The library acquired necessary trade journals and bulletins for the entire CPD, including members of the Cambridge staff who may have worked on various Libby projects. It also retained data of CPD for future use.

i. *Line No. (15) - Industrial Relations.* This department managed benefits, record keeping, and other personnel needs for the entire CPD, including some Libby employees.

j. *Line No. (16) - Zonolite Mfg. Admin.* This department included CPD's Vice President of Mining and Engineering. This department was also involved in marketing vermiculite since it took orders from customers and sent the orders for vermiculite.

k. *Line No. (17) - Non-departmental Exp.* The expenses in this category were for bonuses paid to people who work for CPD,

including people who work at (i) the Libby Operations, and (ii) people at Cambridge who from time to time worked on projects for the Libby Operations. Grace did not identify which employees, if any, whose salaries at the Libby mine were deductible received these bonuses or whether the bonus would be considered part of a deductible salary or benefit, or the basis for allocating the bonuses of Cambridge employees to the Libby operations.

l. *Line No. (18) - Payroll, Insurance, Admin.* This department was in charge of (i) the payroll for some CPD personnel, including salaried employees, (ii) all tax filings, (iii) old age and survivors insurance, (iv) cash and insurance matters, and (v) banking relationships for CPD, including the Montana mine. The payroll for all the nonsalaried people was done at the Libby office.

m. *Line No. (19) - Legal.* This department was responsible for contracts, rental agreements, railroad agreements, and other legal documents, i.e., general legal work, for CPD, including the Libby mine/mill.

n. *Line No. (20) - Safety, Labor Rel.* This department had two functions: a labor relations function which was in charge of union grievances, and a safety function which was in charge of health, safety, toxicology, industrial hygiene and OSHA compliance for CPD, including the Libby mine. The safety function was directly related to the health and safety of the miners and other production people at the Libby mine and that portion, $4,552 in 1977, $3,603 in 1978, and $4,032 in 1979 of the Safety, Labor Relations Department, could be deducted. The expenses of the Labor Relations function could not be deducted.

o. *Line No. (21) - Cafeteria.* This department provided the noontime meal for Cambridge employees. A subsidy was provided so lunches could be eaten quickly, thus allowing Cambridge employees to return to their work places within a reasonable period of time.

p. *Line No. (22) - Office Services.* This Cambridge department included the telephone switch board, the supply function, the stockroom, the shipping and receiving section, records, retention, and the mailroon and messenger service for the Cambridge office itself.

q. *Line No. (23) - Data Input.* This department was responsible for processing CPD payables and invoices.

r. *Line No. (24) - Data Processing.* This department included the cost of the operators and the keypunch personnel for the Cambridge computer.

s. *Line No. (25) - ICG Systems.* This department was in charge of the Cambridge computer's operations, maintenance and repairs.

t. *Line No. (26) - Management Sciences.* This department developed forecast plans to determine ore content of reserves for CPD, including the Libby mine.

u. *Line No. (27) - Patent.* This Patent Group was a separate part of the Cambridge Legal Department. It sought patent protection for equipment and procedures which CPD developed.

v. *Line No. (28) - Employee Benefit Adjustment.* This was a year-end accounting adjustment made to determine the difference between actual benefits and accruals.

In general, "Other Cambridge Expenses", as a group, were the administrative, office, and general overhead expenses of a contemporary corporation or division of a large corporation or conglomerate. Deduction of these expenses was not permitted by ARM 42.22.113, and §§ 15-23-502 and 15-23-503, MCA. These expenses in general were very similar to the expenses which the Montana Supreme Court ruled were not deductible in *Cyprus Mines Corp. v. Madison County*, 172 Mont. 116, 560 P.2d 1342 (1977). See the District Court Opinion, DOR Exhibit 41.

Therefore, the only expense under Cambridge Expenses which could be deducted was that portion of "Safety, Labor Rel." (Line No. 20) devoted to safety of the workers actually engaged in extracting the vermiculite.

13. The remaining deductions were categorized as "Other Libby Expenses" by Grace and "Libby G&A (General and Administrative) Expenses" by DOR. The individual expenses which made up "Other Libby Expenses" were listed as Line Nos. (30) through (43). In general, these expenses included the cost of operating Grace's office in Libby, Montana itself. The various specific expenses which constituted the cost of running the Libby office included:

a. *Line Nos. (30) and (31) - Staff Payroll and Employee Benefits.* These expenses included the salaries and benefits of the General and Assistant Manager for the mine. Their primary job was to directly superintend the management of the mine and mill. Both men spent their time in Montana and physically visited the mine/mill to superintend the production workers during a normal work week as a matter of routine. These two people were the last employees of Grace in the "chain of command" who were actually engaged in directly superintending the management of the mine and mill. Another Grace employee whose salary and benefits were included in these expenses was the Chief Geologist, who directly advised the General Manager and the Mine Superintendent on day to day geological matters concerning the actual mining operation at the mine. Because of this direct "hands-on" involvement the geologist was actually engaged in the working of the mine. The remaining employees at the Libby office included a purchasing agent who purchased supplies and materials, an accounts payable clerk who assisted the purchasing agent, bookkeeper stenos, accountants, accounting clerks and secretaries. These remaining employees were not actually engaged in the working or superintending of the mine .

The exact salaries and benefits for each of these employees, including the Manager, Assistant Manager, and Chief Geologist, were part of a confidentiality agreement between DOR and Grace, and not part of the public record. See, November 31, 1986 [sic]

Agreement and Stipulation with Respect to Proprietary and Confidential Information.

b. *Line No. (32) – Indirect Labor.* This was the cost of part-time secretaries at the Libby office. These secretaries were not actually engaged in the working or superintending of the mine.

c. *Line No. (33) – Outside Services.* This expense included the cost of processing the Libby payroll of nonsalaried employees in 1977 and charges for general maintenance and upkeep at the Libby office. These expenses were not deductible.

d. *Line No. (34) – Power.* This expense was only the cost of electricity for the Libby office. This cost of electricity was separated from the cost of electricity at the mine/mill itself. This expense could not be deducted.

e. *Line No. (35) – Supplies.* This expense was the cost of all office supplies, e.g., papers, pens, computer paper, etc., for both the Libby office and the operation of the mill/mine itself. Since Grace did not separate the expense of the office supplies for the Libby office, which was not deductible, from the expense of those supplies for the Libby mine, which might have been deductible, and did not produce sufficient evidence to impute a reasonable separation, the entire expense could not be deducted.

f. *Line No. (36) – Telephone.* This was the cost of the telephone system for both the Libby office and the mine/mill. Again, Grace did not separate the cost of telephone service at the Libby office from the cost of telephone service at the mine/mill, which might have been deductible, and did not produce sufficient evidence to impute a reasonable separation of that expense from the telephone expense of the Libby office, which could not be deducted. Therefore, the entire expense could not be deducted.

g. *Line No. (37) – Travel.* This expense was the cost of travel for both Grace people at the Libby office and at the mine/mill. The travel included trips to check on purchases and trips to computer school. Again, Grace did not separate out or identify the

people who did the travel and the nature of the travel, so those travel expenses which might possibly be deductible could be identified as opposed to travel expenses which were not deductible. Therefore, the entire expense could not be deducted.

h. *Line No. (38) – Leased Cars.* This was the expense of two cars leased for use by the General Manager and other Grace employees. Again, records on the use of these vehicles was not detailed enough to separate or estimate possibly deductible travel from nondeductible travel, that is, travel around and about the mine/mill versus travel on other business. Therefore, this expense was not deductible.

i. *Line No. (39) – Professional Services.* This expense involved the expense of various professional services which Grace used during the years in controversy. Each expense must be separately examined to determine whether it was deductible. The cost of filing the water claim, the employees' prehire physical examinations, the consultation fee for work on obtaining patents on mining claims, and the cost of servicing and repairing the heating system for the Ore Storage and Blending Building at the mine were deductible because they were actual costs of extracting and milling the vermiculite. However, the cost of the arbitration fee (a grievance under the union contract), the fees for programming the Libby computer, the fees for procuring the Mill Maintenance Supervisor (preemployment professional search fees), and fees for a consulting forest study on timber management on company land were not deductible because they were not costs of the actual extraction of the mineral or were not sufficiently identified as such.

j. *Line No. (40) – Lease Rental.* This was the cost of renting the Libby office building itself. This cost was not deductible actual cost of extracting the mineral.

k. *Line No. (41) – Miscellaneous.* DOR agreed to this deduction. It was not in dispute.

l. *Line No. (42) – Personnel Procurement.* This was the cost related to hiring professional salaried employees, including fees

paid to private employment agencies, travel expenses for prospective employees, temporary living expenses for hired employees, and moving expenses for those hired. Grace did not itemize these expenses according to the individual employee hired by it. In general, this expense was not an actual cost of extracting the vermiculite and was not deductible.

m. *Line No. (43) — Data Processing.* This was the cost of the computer at the Libby office, including rent for the computer itself, charges for supplies, forms, payroll cards, payroll and voucher checks, ribbons and diskettes, and programming and installation costs. Grace did not prorate these computer costs according to the computer's actual function. The computer generally performed functions not directly related to extraction of the minerals and, as such, the costs were not deductible.

CONCLUSIONS OF LAW

1. The Mines Net Proceeds Tax currently is codified as Title 15, part 5, ch. 23, "Centrally Assessed Property". Because of the near impossibility of taxing "minerals in place", the Legislature enacted the Net Proceeds Tax. A Net Proceeds Tax has been part of the Montana property tax scheme since 1864, before statehood itself. It has remained substantially the same since 1879.

2. Under the Mines Net Proceeds Tax, § 15-23-502, MCA, Grace on or before March 31st of each year made out a statement of the gross yield and value of the minerals, together with deductions, and sent the tax return to DOR. See Exhibits 1, 2, and 3, the returns in controversy. The value of the net proceeds itself was reported by Grace on those returns for the preceding calendar year. Grace's self-reported values of its net proceeds were transmitted by DOR to the Lincoln County Assessor on or before July 1st of each year. It was recorded on the property tax assessment rolls as Class One property and was taxed at 100% of its annual net proceeds. § 15-6-131, MCA. That is, the Net Proceeds Tax itself was determined by the Lincoln County Treasurer by multiplying the net proceeds as reported by Grace by the applicable mill levy.

3. The net proceeds itself "is the sum in dollars and cents, remaining after deducting from 'the gross yield in dollars and cents' [the actual costs itemized in §§ 15-23-502 and 15-23-503, MCA]." *Northern Pac. Ry. Co. v. Musselshell Co.*, 74 Mont. 81, 88 (1925). The net proceeds, in other words the benefit from the mine, never left Grace. Also, Grace has owned and continues to own the mine itself and the minerals (vermiculite) in the ground. Therefore, the property remained "under the ownership or control of [Grace] who owned or controlled it at the time it escaped assessment, was erroneously assessed, or was omitted from taxation." § 15-8-601(1), MCA.

4. The statute of limitations issue centered on whether § 15-8-601, MCA, applied to the Mines Net Proceeds Tax for two of the years in controversy, calendar years 1977 and 1978, or whether some other statute, e.g., § 27-2-211, MCA, applied to the tax. Section 15-8-601, MCA, was specifically referred to and incorporated by the general provisions on centrally assessed property, Title 15, ch. 23, MCA. For example, § 15-23-107, MCA, provides: "Whenever the valuation of centrally assessed property is revised under 15-8-601 . . .", and § 15-23-104, MCA, provides: "In estimating the value of the net proceeds of mines, the department shall proceed under 15-23-506 . . . . An assessment . . . based on estimated value . . . is subject to review under 15-8-601."

Recently, the Montana Attorney General held that § 15-8-601, MCA, gave DOR the authority to audit and revise the assessment of the Mines Net Proceeds Tax and the Metal Mines Gross Proceeds Tax. See, 41 Op. Att'y Gen. 67 (1986).

The Montana Supreme Court held in *Butte & Superior Min. Co. v. McIntyre*, 71 Mont. 254, 229 P. 730 (1924), that the statutory predecessor to § 15-8-601, § 84-711, R.C.M. 1947 and § 2121, R.C.M. 1935, applied to the Mines Net Proceeds Tax. Finally, two recent decisions by the Montana Supreme Court specifically held that DOR had 10 years to reassess the property of a taxpayer. *Evans Products Co. v. Missoula County*, 201 Mont. 337, 654 P.2d 523 (1982) and *OEA Research, Inc. v. McGee*, 42 St. Rep. 1219, 704 P.2d 1042 (1985). These authorities

clearly indicate that § 15-8-601, MCA, applies to the Mines Net Proceeds Tax.

5. In 1983, the Legislature adopted a general five year statute of limitations for centrally assessed property and other taxes. Ch. 194, L. 1983. That law did not expressly repeal § 15-8-601, MCA. Grace contended that this law implicitly repealed § 15-8-601, MCA, insofar as it applied to centrally assessed property. A recent District Court decision in *Tricentrol United States, Inc. v. State of Montana*, Cause No. ADV-85-741, First Judicial District, Lewis and Clark County, held:

> Both parties concede that Section 15-23-116 (Chapter 194) is a five-year statute of limitations which governs the net proceeds tax. However, *Section 3 of Chapter 194 states that it is applicable retroactively only to taxable periods covered by returns due after December 31, 1980* . . . Section 1-2-109, MCA, provides that 'no law contained in any of the statutes of Montana is retroactive unless expressly so declared.' (Court's emphasis.)

District Court Opinion, pp. 5-6.

In order for Ch. 194, L. 1983 to implicitly repeal § 15-8-601, MCA, the two statutes must be plainly and irreconcilably repugnant to or in conflict with each other. Section 15-8-601, MCA, does not conflict with Ch. 194, L. 1983, because by its own terms it did not apply to the years in controversy, calendar years 1977, 1978, and 1979. The legal effect of § 15-8-601, MCA, and Ch. 194, L. 1983, on the Net Proceeds Tax is set forth in ARM 42.22.1207. Therefore, Ch. 194, L. 1983, now codified as § 15-23-116, MCA, did not expressly or implicitly repeal § 15-8-601, MCA. The "statute of limitations" which applied to the years in controversy was found in § 15-8-601, MCA.

6. Section 15-8-601(1), MCA, (previously codified as § 84-711, R.C.M. 1947) provides:

> (1) Whenever the department of revenue discovers that any taxable property of any person has in any year

> escaped assessment, been erroneously assessed, or been omitted from taxation, the department may assess the same provided the property is under the ownership or control of the same person who owned or controlled it at the same time it escaped assessment, was erroneously assessed, or was omitted from taxation. All such revised assessments must be made *within 10 years* after the end of the calendar year in which the original assessment was or should have been made. (Emphasis supplied.)

The Board concludes that a portion of the net proceeds of Grace for the years in controversy escaped assessment, was erroneously assessed, and was omitted from taxation. DOR revised the assessments within the 10 years provided in § 15-8-601, MCA. DOR's audit and assessment of Grace's net proceeds tax for the years in controversy, calendar/production years 1977, 1978, and 1979, was done in conformity with the applicable statute, § 15-8-601, MCA.

7. The second general issue in dispute involved the various expenses which Grace deducted on its net proceeds tax return and which DOR disputed as a result of its audit. Two provisions of the Mines Net Proceeds Tax deal with deductions, §§ 15-23-502 and 15-23-503, MCA. Those two provisions must be read together. Section 15-23-503, MCA, provided:

> Net proceeds shall be determined by subtracting from the value of the gross product thereof the following:
> . . .
>
> (b) all moneys *expended* for necessary labor, machinery, and supplies needed and used *in the mining operations and developments*;
> (c) all moneys expended for improvements, repairs, and betterments necessary in and about *the working of the mine*, except as hereinafter provided;
> (d) all moneys expended for costs of *repairs and replacements of the milling and reduction works used in connection with the mine*;

(f) all moneys *actually expended* for transporting the ores and mineral products or deposits from the mines to the mill or reduction works or to the place of sale and for extracting the metals and minerals therefrom and for marketing the product and the conversion of the same into money;
(g) all moneys expended for insurance and welfare and retirement costs reported in the statement required in 15-23-502;

. . .

(4) No moneys invested in the mines and improvements during any year except the year for which such statement is made and except as provided in this section may be included in such expenditures, and *such expenditures may not include the salaries or any portion thereof of any person or officer not actually engaged in the working of the mine or superintending the management thereof.* (Emphasis supplied.)

Section 15-23-502, MCA, further provides:

Such [net proceeds] statement shall show the following:

. . .

(5) the gross yield or value in dollars and cents;
(6) [actual] cost of *extracting* [the vermiculite] from the mine;
(7) [actual] cost of transporting [the vermiculite] *to place of* reduction or *sale*;
(8) [actual] cost of reduction or sale;
(9) [actual] cost of marketing the product and conversion of same into money;
(10) cost of construction, repairs, and betterments of mines and cost of repairs and replacements of reduction works;
(11) the assessed valuation of reduction works for the calendar year for which such return is made;
(12) [actual] cost of fire insurance, workers' compensation insurance, boiler and machinery insurance . . . . (Emphasis supplied.)

See, DOR Exhibit 57, the Dowling Affidavit.

The pertinent administrative rules include:

> 42.22.1118 GENERAL TREATMENT OF DEDUCTIONS
>
> . . .
>
> (2) The purpose of the regulations is to set forth the intent of the law and its interpretation by the courts and to provide firm, unambiguous guidelines for valuing the product of a mining operation. The method followed determines the actual value of the *extracted* mineral and allows the deduction of just and equitable costs incurred in the *actual* mining, reduction, and marketing of the product.
>
> (3) *The Net Proceeds of Mines law provides for limited deductions incurred at the mine location in Montana and not the broad spectrum of deductions allowed by income tax laws. These deductions are specific and should not be construed to include items not listed.* The deductions may vary depending on the point of valuation of the mineral, but will never be greater than those provided by statute. (Emphasis supplied.)

ARM 42.22.1102 provides:

> . . .
>
> (2) *No miscellaneous items will be allowed as deductions.* All deductions must be itemized.

ARM 42.22.1113 provides:

> . . .
>
> (2) Labor shall include all monies expended for actual costs of necessary labor *in the extracting of the mineral deposit.*
>
> . . .
>
> (4) Salaries of engineers, geologists, and other technical personnel are a deductible item *only to the extent that such personnel are employed exclusively in the mine operation.*

> (5) Superintendents shall be meant to include only the persons or officers *actually engaged directly* in the working of the mine or superintending the management thereof (*at the mine site or in the vicinity thereof). This deduction is not meant to include any personnel in a corporate or headquarters office who have no part in the actual operation of the mine.* (Emphasis supplied).

These rules have been in effect since 1974.

8. Clearly, under the law and applicable administrative rules, deductions under the Net Proceeds Tax are generally only the direct expenses actually incurred in extracting the mineral, and not the broad categorical expenses sought by Grace. The Montana Supreme Court has faced the issue of deductions in three principle cases: *Anaconda Copper Mining Co. v. Junod*, 71 Mont. 132, 227 P. 1001 (1924); *Pfizer v. Madison County*, 161 Mont. 261, 505 P.2d 309 (1973); and *Cyprus, supra*. This Board recently has faced the question of deductions under the Net Proceeds Tax in two cases: *Somont Oil Co. v. DOR*, (Docket No. PT-1982-17) and *Ed Vander Pas Oil v. DOR*, (Docket No. MT-1983-3). Those decisions were affirmed by the District Court. *See, Somont Oil Co., Inc. v. Dept. of Revenue*, Cause No. 12994, Ninth Judicial District, Toole County, and *Ed Vander Pas Oil v. Dept. of Revenue*, Cause No. 12995, Ninth Judicial District, Toole County.

9. *Cyprus Mines, supra*, states:

> A general rule of taxation is that any item may serve as a deduction *only when the legislature specifically establishes the deduction* . . . A revenue statute allowing a deduction should be construed with *specificity*, as opposed to the rule of liberal construction which generally applies to revenue laws. (Emphasis supplied.)

The United States Supreme Court has stated the general principles for judging a deduction:

> Allowance of deductions . . . *does not turn on general equitable considerations. It depends upon legislative*

> *grace*; and only as there is *clear provision* therefore can any particular deduction be allowed. (Emphasis supplied.)

Deputy v. DuPont, 308 U.S. 488, 493 (1939).

This means that if doubt exists about whether a specific expense is deductible, it should be resolved against the taxpayer and such terms as "necessary expense" or "actual cost" of extracting the mineral should be narrowly construed against the Taxpayer, Grace.

10. It is well established that:

> [a] [T]axpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.

New Colonial Co. v. Helviring, 295 U.S. 435, 440 (1934).

Further, because the Taxpayer has control over the records and evidence:

> The burden is on the taxpayer to remove [the] determination [of whether a specific item is deductible] from the realm of conjecture or speculation.

Department of Revenue v. State Tax Appeal Board, 188 Mont. 244, 250 (1980).

As this Board stated in the *Vander Pas* and *Somont* cases, *supra*:

> The amount of the deduction must be definable. That is, there must be specific reasonable figure and not a vague generalization.

Somont, *supra*, at 7.

If the taxpayer, as Grace did, combined deductible and nondeductible expenses in the same category or line item, and did not present any method for separating or determining the actual amount of the deductible expense from the nondeductible expense, the entire claim must fail. This failure specifically applied to Line Nos. (35) through (40).

11. In the *Anaconda* case, *supra*, the Montana Supreme Court clearly set the standard for interpreting the Net Proceeds Tax and for determining deductions under that tax.

> In order to arrive at a solution of the question presented, it is necessary for us to give effect to all of the above statutes, and from an inspection of them it will be readily seen that, so far as extracting the ore from the mine is concerned, they are clear and explicit, and the deductible items are specifically mentioned. In other words, the terms 'actual cost' of extracting the ore from the mine have a definite and fixed meaning. To illustrate: If liability insurance was carried by an operator, on men employed in extracting ore, the cost thereof could not under any circumstances be deducted. Neither could taxes on machinery. (Sec. 2096, *supra*.) Therefore, in this instance, at least, the legislature left no doubt what it meant by the words 'actual cost of extracting the same (the ore) from the mine.' If this premise is correct, and we think it is, can it be that the legislature intended to fix a more elastic provision by using the words 'actual cost of reduction or sale' (sub. 8, sec. 2089, *supra*), and in connection therewith, the language set forth in section 2090, *supra*, 'also all money *** for extracting the metals and minerals therefrom' [the ore]? *We think not.* We are of the opinion that *the words 'actual cost' in both instances were used in a restricted sense;* that is to say, in case of extracting ores from the mine, not all, *but only the direct, costs and expenses were contemplated as deductible items.* And likewise nothing more was to be taken into consideration in extracting the metals and minerals from the ores. If the legislature had intended that taxes and fire insurance premiums could be taken into consideration as deductible items, it could have easily said so. *The fact that the statute is wholly silent upon these items indicates to us that they were not to be considered in any instance as part of the actual cost in arriving at net proceeds of mines for the purpose of taxation.* (Emphasis supplied.)

Anaconda Copper Mining Co. v. Junod, *supra*, at 137-138.

Clearly, §§ 15-23-502 and 15-23-503, MCA, must be read together. The deductions itemized in § 15-23-503, MCA, are further modified by § 15-23-502, MCA.

In *Cyprus Mines*, *supra*, and *Pfizer*, *supra*, the Montana Supreme Court upheld the principal holding in the *Anaconda*, *supra*, case:

> It was the aim and intention of the legislature to fix some definite and uniform basis for the determination of net proceeds . . . for taxation purposes. This it has done by authorizing deductions of only *actual costs. It was not its intention to permit deduction of every conceivable item or expense.* (Emphasis supplied.)

Anaconda Copper Mining Co. v. Junod, *supra*, at 138-140.

Again, the terms "actual costs" and "necessary expenses" of extracting the mineral are to be construed in a restrictive sense and not in the liberal sense that Grace proposed in these proceedings. The applicable administrative rules, supra, follow the guidelines set by the Montana Supreme Court and are not arbitrary, capricious, or otherwise unlawful.

The Net Proceeds Tax is not an income tax. It does not tax the income from the mine; it taxes the net proceeds. The definition of "necessary expense" under either the federal or state income or corporation tax does not apply to the Net Proceeds Tax. The Net Proceeds Tax and administrative rules allow only the deduction of the actual costs of extracting and milling the mineral, and not the general business expenses associated with a mine/mill which Grace sought to deduct under the general heading of "Other Cambridge Expenses" and "Other Libby Expenses".

12. In *Pfizer*, *supra*, the Montana Supreme Court stated:

> The intent [of the Net Proceeds Tax] was to tax the proceeds of the mine. When such proceeds are milled

> or manufactured into other products, that tax does not apply . . . We find the net proceeds tax . . . does not apply to the talc once it has passed the beneficiation stage . . . Now that we have found that the *tax only applies to the beneficiation stage*, Pfizer of course will not, and cannot, deduct expenses of its final milling stage against its net proceeds tax. *Where the net proceeds tax ends, there also ends the deductions for such tax. Only deductions for the mining operation will be allowed up through the beneficiation stage. All other expenses will be incurred as to the manufacturing process.* (Emphasis supplied.)

Pfizer, supra, at 267.

This limitation applies to all deductions. For example, the costs associated with transporting the vermiculite past the point of beneficiation, e.g., Line No. 7, could not be deducted since the value of the vermiculite past that point was not the value used to determine the value of net proceeds.

13. In *Cyprus, supra*, the Montana Supreme Court stated:

> The language used in *Anaconda Copper Mining Co.* displays an intent to determine the net proceeds of mines by a definite and uniform method. On the other hand, Taxpayer's allocation formula contemplates expenses incurred not only by its Montana facilities, but by all of the facilities which comprise the Cyprus Industrial Mineral Company. *Further, Taxpayer's allocation formula contemplates expenses incurred by the taxpayer beyond the beneficiation stage, as defined in Pfizer* (Court's emphasis). *Taxpayer's allocation formula fails to meet the test of definiteness and uniformity contemplated in* [§ 15-23-503, MCA]. Taxpayer failed to allocated the actual costs which it incurred in the mining of talc, when determining the net proceeds . . . . (Emphasis supplied.)

Cyprus, supra, at 120.

Any allocation formula must arrive at an "actual cost" of extracting the mineral or other deductible "actual cost". Further, elements of the allocation method cannot include nondeductible costs such as cost incurred past the point of beneficiation or the salaries of employees not actually engaged in the working of the mine or directly superintending the mine.

The allocation formulas used for "Other Cambridge Expenses" (Line Nos. 7 through 28) generally were either identical or very similar to the formula used by Cyprus and therefore, suffered the same legal defects.

14. Section 15-23-503(4), MCA, states:

> [S]uch expenditures [deductions] *may not* include the salaries or any portion thereof of any person or officer *not actually* engaged in the working of the mine or superintending the management thereof. (Emphasis supplied.)

This limitation applies to all deductions under the Net Proceeds Tax. In *Somont*, *supra*, this Board ruled this limitation applied to clerical workers. Somont Order, p. 3. In general, this Board also has ruled that general office or "overhead" expenses were not deductible under the Net Proceeds Tax. *Ed Vander Pas Oil Op.*, p. 8. This limitation particularly applied to all the expenses under "Other Cambridge Expenses" (Line Nos. 7 through 28) and most of the personnel expenses under "Other Libby Expenses" (Line Nos. 30 through 32). Also see ARM 42.22.1113.

15. The Montana Supreme Court has developed and DOR has followed only one very limited exception to its rule that deductions under the Net Proceeds Tax were to be narrowly construed. That area involved the actual compensation and protection of workers actually engaged in extracting and milling the mineral. In *Brophy Coal Co. v. Matthews*, 125 Mont. 212, 233 P.2d 397 (1951), the Montana Supreme Court held that payments for the miners' health and welfare fund were part of "moneys expended for necessary labor." There is a strong public policy in favor of protecting the health and safety of the workers.

Similarly, money expended solely to protect the health and safety of the actual production workers because of either a collective bargaining agreement or federal or state regulations are "moneys expended for necessary labor", i.e., the cost of labor actually extracting the mineral. This limited exception was applied by DOR when it did not contest the deduction of tremolite control expenses because those costs were necessitated by federal regulation and necessary to protect the production workers from cancer. DOR also did not contest the deduction of other safety related expenditures, e.g., Line No. (41). That rationale applied to the safety expenses in Line No. (20) and to the normal "Watchman Expenses", Line No. (3), but did not apply to the extra strike security costs.

16. Because the insurance premiums for liability insurance were not deductible, the proceeds from that policy could not be used to offset deductible expenses. Line No. (6), "Hauling and related costs during period river crossing conveyor inoperative" was deductible, or rather the income from that insurance policy was not part of the value of the vermiculite extracted from the mine.

17. In summary, the Board concludes that all the expenses in dispute after DOR concessions were not deductible under the Mines Net Proceeds Tax and the administrative rules applicable to the production/calendar years in question except:

a. Line No. (3), Watchman Expenses;

b. The "Factory T.S. Libby" expenses of Line No. (4), "Cambridge Tech. Service", i.e., $1,614 for 1977 and $160 for 1978;

c. Line No. (6), Hauling and related costs during period river crossing conveyor inoperative;

d. The Safety portion of Line No. (20), "Safety, Labor Relations", i.e., $4,522 for 1977, $3,603 for 1978, and $4,032 for 1979;

e. The portion of the salaries and benefits for the Manager, Assistant Manager, and Chief Geologist in Line Nos. (30), "Staff Payroll", and Line No. (31), "Employee Benefits"; and

f. The fee for filing water right claim ($68), the expenses for employees' prehire physical examination ($150), the consulting

fee for obtaining patents on mining claims ($1,600), and the cost of servicing and repairing the heating system for the Ore Storage and Blending Building ($2,300) in Line No. (39), "Professional Services".

ORDER

The Department of Revenue shall revise its deficiency assessment and subsequent supplemental certification of net proceeds in conformance with the Stipulations between the parties and the Findings of Fact and Conclusions of Law entered hereinabove. Except where specifically otherwise reversed, the remainder of the Department of Revenue's deficiency assessment is affirmed and W.R. Grace's appeal is dismissed.

DATED this 21st day of April, 1987.

BY ORDER OF THE
STATE TAX APPEAL BOARD

/s/ Robert S. Raundal
ROBERT S. RAUNDAL, Chairman

/s/ Dale D. Dean
DALE D. DEAN, Member

Member, Mary E. Hempleman, dissents as follows:

I agree in general with my colleagues in the findings in this decision, dissenting on two issues only. They are:

1. The statute of limitations in 15-23-116, MCA, bars any deficiency assessment of net proceeds tax for the years 1977 and 1978.

The comments by the Department of Revenue in seeking the passage of this statute makes it clear that the Department considered the previous two-year statute of limitations an insufficient period of time in which to audit and revise assessments. Had the Department or the Legislature considered that this statute replaced any provision for a 10 year statute of limitation, this section could have been made retroactive for five years.

The fact that this statute was only made retroactive for two years convinces me that the 1977 and 1978 deficiency assessments are invalid and barred by the two year statute of limitations in force in those years.

Section 15-23-104, MCA, referred to by the Department as authority to use the ten year retroactive assessment procedure in 15-8-601, MCA, specifically restricts the usage to estimated or imputed assessments made by the Department where the taxpayer has failed to file a timely report. The Department has made no contention that the taxpayer in this case has failed to file. Indeed, the fact that the taxpayer filed timely reports in 1977 and 1978 is included in the Stipulation of Agreed Facts presented to this Board by the Department and the taxpayer.

2. The allowable deduction for Line item (6) should be $100,000, the actual out-of-pocket expenses for the W.R. Grace company for hauling and related costs during the period the river-corssing [sic] conveyor was inoperative.

The Department agreed to allow only the out-of-pocket expense for the Construction Products Division of $2,500, while the taxpayer contended for the total cost of $260,702, asking as an alternative that $100,000 be allowed as a deduction.

The taxpayer was reimbursed $160,702 of this expense by insurance, and had only $100,000 actual expense for this item. Section 15-23-503(f) specifically permits only "*moneys actually expended* for transporting the ores and mineral products". Emphasis supplied. Therefore, I consider that the allowable deduction for this line item should be $100,000.

/s/ Mary E. Hempleman

Mary E. Hempleman, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days after the service of this Order.

CERTIFICATE OF SERVICE

I certify that on this 21st day of April, 1987, a true and correct copy of the foregoing has been served by placing same in the United States Mail, postage prepaid, and addressed as follows:

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/s/ Sandra D. Waddell

Sandra D. Waddell
Administrative Aide

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 88-266

W. R. GRACE & CO., a corporation,	)	
	)	
Petitioner/Appellant,	)	
	)	
-v.-	)	
	)	
DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,	)	AMENDED PETITION FOR REHEARING
	)	
	)	
Defendants/Respondents.	)	

Petitioner/Appellant, W.R. Grace & Co. (hereafter referred to as "Petitioner"), pursuant to M.R. App. Civ. P. 34, hereby files this Amended Petition for Rehearing supplementing its original Petition for Rehearing filed with this Court on August 25, 1989. This amended petition is based on newly discovered facts pertaining to unlawful procedure between the State Tax Appeal Board (hereafter referred to as "STAB") and the Montana Department of Revenue (hereafter referred to as "Department"). In addition to those reasons contained in the original Petition for Rehearing, Petitioner requests this Court to reconsider its August 18, 1989, decision for the following, supplemental reasons:

1. After the hearing of evidence by and the submission of briefs to STAB in this matter, STAB contacted the attorney for the Department and requested him to prepare its decision, all without notice to the Petitioner.

2. This contact was made *ex parte* and in secret, leaving the Petitioner without an opportunity to respond to the Department's submission to STAB.

3. This unlawful procedure prejudiced Appellant by *inter alia*:

(a) Denying Petitioner access to the *ex parte* communication and an opportunity to respond thereto.

(b) Denying Petitioner an opportunity to respond or be heard with respect to documents wrongfully provided *ex parte* by the Department to STAB.

(c) Resulting in the issuance of a final decision that is unlawful and violates the statutory and constitutional rights of the Petitioner since the decision was made upon unlawful, *ex parte*, unfair, and unconstitutional procedures, as well as procedures that constituted an abuse of discretion.

4. The grounds underlying this Amended Petition for Rehearing are based on facts which have just come to Petitioner's attention as follows:

(a) On July 21, 1989, at 9:30 a.m., the deposition of the Department's Tax Counsel, Paul VanTricht, was taken at the Department's office at the Mitchell Building in Helena.

(b) The deposition was taken in the Twelfth Judicial District Cause No. DV-89-039, *Norfolk Energy, Inc. v. Department of Revenue of the State of Montana and Blaine, Choteau, and Hill Counties.*

(c) This Hill County district court case involves tax assessment appeals determined by STAB, appealed by the taxpayers to the district court alleging error on the merits, as well as on the basis that STAB and the Department had violated the taxpayers' statutory and constitutional rights by participating in *ex parte* contacts.

(d) During this deposition, the Department's tax counsel was questioned as to other cases in which he had had *ex parte* contacts with STAB.

(e) Mr. VanTricht, at pages 35-36 of his deposition (copies of these pages are attached to this Amended

Petition for the convenience of the Court), identified several tax cases, including the *W.R. Grace* case, the instant case, currently before this Court on the above-described rehearing petition.

5. Mr. VanTricht is the attorney for the Department in the present case in which this *amended* Petition is being filed.

6. Such action by the Department and STAB is in violation of Petitioner's constitutional, statutory, and regulatory rights, including but not limited to due process rights under the Fourteenth Amendment to the U.S. Constitution and Mont. Const. art. III, § 17.

7. Such action is also violative of Montana law, specifically but not limited to MCA § 2-4-613.

ARGUMENT

The "basic principles of our jurisprudence" and the "very heart of our system of government" include "due process, fair play, open proceedings, [and] unbiased, uninfluenced decision[s]." *WKAT, Inc. v. F.C.C.*, 296 F.2d 375, 383 (D.C. Cir. 1961), *cert. denied sub nom. Pub. Serv. Television, Inc. v. F.C.C.*, 368 U.S. 841 (1961). Petitioner did not know of the *ex parte* contacts between STAB and the Department in this case. If Petitioner had been told that such contacts had been made, it would have demanded that secret communications not take place and that it be given a copy of any submissions made to STAB by the Department, as well as an opportunity to file written objections thereto and file its own draft.

STAB's practice violates the Petitioner's rights under the due process clause of the Fourteenth Amendment of the U.S. Constitution, as well as its counterpart in Mont. Const. art. II § 17: "No person shall be deprived of life, liberty, or property without due process of law." Clearly the *ex parte* interchange between STAB and the Department raises substantial due process questions.

In *State v. Pease*, 45 St. Rep. 1296, 758 P.2d 764, 767 (Mont. 1988), for example, Mr. Pease contended he had been:

> [D]enied due process when his probation officer conversed by telephone with the District Judge on September 15, 1987, just prior to his September 18 arrest. Consequently, Pease argues that our decision in State v. Redding (1984), 208 Mont. 24, 675 P.2d 974 demands reversal of the revocation. We disagree.
>
> In *Redding*, we held the defendant had been denied due process when the sentencing judge conferred with the presentence investigation officer behind closed doors with no opportunity for argument, rebuttal or explanation. However, *Redding* is distinguishable from the instant case. Here, the District Judge conferred with Pease's probation officer after Pease had already been convicted and sentenced. Then, prior to revoking the suspended sentence and reinstating the 15 year imprisonment sentence on December 2, 1987, Pease was given the opportunity for argument, rebuttal and explanation in two separate proceedings. We conclude, Pease was not denied due process of law, and the rule of State v. Redding, supra, does not apply.

The distinction between *Pease* and *Redding* is precisely the distinction that is critical here. As in *Redding*, STAB and the Department intentionally kept their process closed and denied Petitioner an equal opportunity to participate.

In *Chicopee Manufacturing Corp. v. Kendall Company*, 288 F.2d 719, 724-25 (4th Cir. 1961), *cert. denied*, 368 U.S. 825 (1961), the court said:

> There is authority for the submission to the court of proposed findings of fact and conclusions of law by the attorneys for the opposing parties in a case, and the adoption of such of the proposed findings and conclusions as the judge may find to be proper. [Citations omitted.] In South Carolina, we are told, under a practice that prevails widely in the trial courts of the

> state, the opinion is frequently prepared at the request of the judge by the attorney for the successful party. But there is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side. That practice involves the failure of the trial judge to perform his judicial function *and when it occurs without notice to the opposing side, as in this case, it amounts to a denial of due process.*

(Emphasis added.)

CONCLUSION

For the reasons stated herein, as well as those stated in the Petitioner's original rehearing petition, it is respectfully requested that this Court grant a rehearing in this matter and grant any other and further relief appropriate to its proper disposition.

Dated this 12th day of September, 1989.

PAUL H. FRANKEL
Morrison [&] Foerster
415 Madison Avenue
New York, NY 10017-1193

TERRY B. COSGROVE
Luxan & Murfitt
P.O. Box 1144
Helena, MT 59624

By: /s/ George T. Bennett
GEORGE T. BENNETT
Arcade Building, Suite 3J
P.O. Box 1705
Helena, MT 59624

Attorneys for Appellant

CERTIFICATE OF SERVICE

I, George T. Bennett, do hereby certify I served a copy of the foregoing Amended Petition for Rehearing upon all parties of record on the 12th day of September, 1988, by mailing a copy thereof to:

Mr. Paul VanTricht
Tax Counsel
Department of Revenue
Sam W. Mitchell Building
Helena, MT 59620

/s/ George T. Bennett
George T. Bennett

MONTANA TWELFTH JUDICIAL DISTRICT
HILL COUNTY

NORFOLK ENERGY INC., Petitioner, —vs— DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Respondent, and BLAINE, CHOUTEAU and HILL COUNTIES, Intervenors.	)	Cause No. DV-89-089

DEPOSITION OF PAUL VANTRICHT

BE IT REMEMBERED, that the deposition upon oral examination of PAUL VANTRICHT, appearing at the instance of Petitioner, was heard at the Offices of the Department of Revenue, State of Montana, Mitchell Building, Helena, Montana, on the 21st day of July, 1989, beginning at the hour of 9:30 a.m., before Sherron Walstad, Court Reporter, Notary Public.

• • • • • • • • • •

CRARY & HENDRICKSON REPORTING
17 West Sixth Avenue, Power Block West
P.O. Box 1222
Helena, Montana 59624
(406) 443-0080

[P. 35]

really testify on those matters with any degree of certainty.

Q. Do you know why they contacted you to write a draft decision for them in this case?

A. No, other than the fact that it is one of their standard procedures.

Q. Certainly every case that you are involved in with the board you don't draft a decision?

A. No. I sometimes lose.

Q. How many decisions have you drafted for the board?

A. We're talking about decisions which they dictated to me. Oh, golly. I can recall at this time, and there may be more; let's see, three or four that I can recall. There may be more.

Q. Do you recall the names of those cases?

A. Hold it. I've got to go back. I don't know what you mean by decisions. There may have been more, you know. Well, let's go back. Could you repeat the question?

Q. How many times has the board requested of you to prepare draft proposed findings of fact and conclusions of law?

A. Again, it's maybe four times. They've asked me to prepare orders of other natures.

Q. Right, but a draft decision document similar to what was prepared in TriCentrol.

A. Right. You're talking about similar?

[P. 36]

Q. Yes.

A. I think four or five.

Q. Was one of them a case called Somont, S-o-m-o-n-t?

A. Yeah, I believe so, yes.

Q. Vanderpas, V-a-n-d-e-r-p-a-s –

A. I believe so, yes.

Q. And Grace?

A. Probably, I think so.

Q. And Mountain State Resources?

A. I don't recall Mountain State Resources. I don't recall that case, but then again, if it took place over a couple of years ago, I could or couldn't. I'm not quite sure.

Q. Did the board indicate at the meeting, or at any time, why it was asking you to prepare the draft decision document?

A. You mean in so many words?

Q. Yeah. Did they indicate why they were approaching you in the TriCentrol case?

A. Directly, no. I mean, this is their standard procedure.

Q. When you say it's their standard procedure, can you reference us to a – is this promulgated in a regulation form in this standard procedure?

A. No. I haven't reviewed their regulations in some time, so I don't know if they've done this in writing or

APPENDIX H

STATUTORY PROVISIONS INVOLVED

1979 Code

15-23-503. Net proceeds — how computed. (1) The department of revenue shall calculate from the returns the gross product yielded from such mine and its gross value for the year covered by the statement and shall calculate and compute the net proceeds of the mine yielded to the person engaged in mining. Net proceeds shall be determined by subtracting from the value of the gross product thereof the following:

(a) all royalty paid or apportioned in cash or in kind by the person so engaged in mining;

(b) all moneys expended for necessary labor, machinery, and supplies needed and used in the mining operations and developments;

(c) all moneys expended for improvements, repairs, and betterments necessary in and about the working of the mine, except as hereinafter provided;

(d) all moneys expended for costs of repairs and replacements of the milling and reduction works used in connection with the mine;

(e) depreciation in the sum of 6% of the assessed valuation of such milling and reduction works for the calendar year for which such return is made;

(f) all moneys actually expended for transporting the ores and mineral products or deposits from the mines to the mill or reduction works or to the place of sale and for extracting the metals and minerals therefrom and for marketing the product and the conversion of the same into money;

(g) all moneys expended for fire insurance and workers' compensation insurance and for payments by mine operators to welfare and retirement funds when provided for in wage contracts between mine operators and employees.

(2) In computing the deductions allowable for repairs, improvements, and betterments to the mine, the department shall allow 10% of such cost each year for a period of 10 years.

(3) No moneys invested in mines or improvements may be allowed as a deduction unless all machinery, equipment, and buildings represented by such moneys are returned to the county in which such mine is located for assessment purposes at the level of assessment of all other property in such county.

(4) No moneys invested in the mines and improvements during any year except the year for which such statement is made and except as provided in this section may be included in such expenditures, and such expenditures may not include the salaries or any portion thereof of any person or officer not actually engaged in the working of the mine or superintending the management thereof.

1989 Code

15-8-601. Assessment revision — conference for review. (1) Whenever the department of revenue discovers that any taxable property of any person has in any year escaped assessment, been erroneously assessed, or been omitted from taxation, the department may assess the same provided the property is under the ownership or control of the same person who owned or controlled it at the time it escaped assessment, was erroneously assessed, or was omitted from taxation. All such revised assessments must be made within 10 years after the end of the calendar year in which the original assessment was or should have been made.

* * *

15-23-116. Statute of limitations. (1) Except as otherwise provided in this section, no deficiency may be assessed or collected with respect to the year for which a return is filed unless the notice of additional tax proposed to be assessed is mailed within 5 years from the date the return was filed. For the purposes of this section, a return filed before the last day prescribed for filing is considered as filed on the last day. If the taxpayer, before the expiration of the period prescribed for assessment of the tax, consents in writing to an assessment after that time, the tax may be assessed at any time prior to the expiration of the period agreed upon.

APPENDIX I

Excerpted Questions and Answers From
the Deposition of Paul Van Tricht, in
Norfolk Energy Inc. v. Department of Revenue,
Montana Twelfth Judicial District,
Hill County, Cause No. DV-89-089, July 21, 1989

P. 11 (lines 17-25) through P. 12 (line 1)

Q. And Mr. Dean [Chairman of STAB] telephoned you here at your office of Legal Affairs?

A. Yes.

Q. And what did he say?

A. As best I recall at this time, and it has been four months, five months now, six months, Mr. Dean informed me that the State Tax Appeal Board had reached a decision in the matter of the TriCentrol case, and they wished me to transcribe or reduce to writing that decision which had been made by the board.

* * *

P. 17 (lines 5-8)

Q. I should ask you, Paul, just so the record is clear, did you inform legal counsel for the taxpayer that Mr. Dean had called you?

A. I don't think so.

* * *

P. 35 (lines 2-25) through P. 36 (lines 1-20)

Q. Do you know why they contacted you to write a draft decision for them in this case?

A. No, other than the fact that it is one of their standard procedures.

Q. Certainly every case that you are involved in with the board you don't draft a decision?

A. No. I sometimes lose.

Q. How many decisions have you drafted for the board?

A. We're talking about decisions which they dictated to me. Oh, golly. I can recall at this time, and there may be more; let's see, three or four that I can recall. There may be more.

Q. Do you recall the names of those cases?

A. Hold it. I've got to go back. I don't know what you mean by decisions. There may have been more, you know. Well, let's go back. Could you repeat the question?

Q. How many times has the board requested of you to prepare draft proposed findings of fact and conclusions of law?

A. Again, it's maybe four times. They've asked me to prepare orders of other natures.

Q. Right, but a draft decision document similar to what was prepared in TriCentrol.

A. Right. You're talking about similar?

Q. Yes.

A. I think four or five.

Q. Was one of them a case called Somont, S-o-m-o-n-t?

A. Yeah, I believe so, yes.

Q. Vanderpas, V-a-n-d-e-r-p-a-s –

A. I believe so, yes.

Q. And Grace?

A. Probably, I think so.

Q. And Mountain State Resources?

A. I don't recall Mountain State Resources. I don't recall that case, but then again, if it took place over a couple of years ago, I could or couldn't. I'm not quite sure.

Q. Did the board indicate at the meeting, or at any time, why it was asking you to prepare the draft decision document?

A. You mean in so many words?

Q. Yeah. Did they indicate why they were approaching you in the TriCentrol case?

A. Directly, no. I mean, this is their standard procedure.

* * *

P. 37 (lines 23-25) through P. 38 (lines 1-16)

Q. Mr. Van Tricht, going on to another point there at the hearing, were you aware that no mention in this case was made by the Tax Appeal Board that the prevailing party might be requested to prepare a draft findings of fact and conclusions of law? Were you aware that the Tax Appeal Board did not make that statement that the prevailing party might be so requested?

A. I wasn't there, so I don't know. I assume that the State Tax Appeal Board believed you were aware of the standard practice.

Q. Mr. Van Tricht, I want to hone-in on this standard practice a little bit. Why do you state here under oath it is a standard practice of the State Tax Appeal Board?

A. Because it is.

Q. How do you know that to be the case?

A. Because of conversations with — Because of conversations I've had with the State Tax Appeal Board with counsel representing the taxpayers and my past experience with various files, and including your firm.

* * *

P. 39 (lines 18-25) through P. 40 (lines 1-5)

Q. Is it your testimony that in every case the Tax Appeal Board contacts the prevailing party and requests that party to submit a draft decision document of findings of fact and conclusions of law?

MR. WOODGERD: When you say "every case," you mean every case that the State Tax Appeal Board has in front of them?

MR. SITES: Yes.

A. I can't testify. I don't know because I haven't handled every case they've ever had. I'm not quite sure. I do know that they've asked me to prepare decisions, and they've asked opposing counsel representing the taxpayer to prepare decisions. That's what I do know.

* * *

P. 63 (lines 10-25)

Q. Mr. Van Tricht, the day you submitted the hard copy draft proposed findings of fact and conclusions of law with the disk to the Tax Appeal Board, did you send a copy of that hard copy to counsel for the other parties involved in this appeal?

A. You mean to you?

Q. Yes. Did you send me a copy of that document[?]

A. No.

Q. Why not?

A. At that time it didn't occur to me because I assumed that you were aware of STAB's standard operating procedure.

Q. Did you send a copy of that hard copy to any of the county attorneys?

A. No. Or anyway, my records don't reflect so, and I don't think I would have.

APPENDIX J

Excerpt from the Department of Revenue's
Brief to the Montana Supreme Court
(pp. 58-61)

[p. 58]

VII. THE DISTRICT COURT PROPERLY REVIEWED THIS CASE

This appeal involves the review of a decision by the District Court which itself was a review of a decision by the State Tax Appeal Board.[22] The Board members are appointed by the governor and confirmed by the Senate for six-years terms. Montana is unique in that the administrative decisions of the Department of Revenue are reviewed **de novo** by an independent body, STAB, before review by the Judiciary.

This situation clearly is different from that found in any other type of judicial review of an "administrative" decision in Montana or reviews of administrative tax decisions in other states. In most states the Department of Revenue's decision is the decision which is appealed to the Courts. Therefore, the District Court's review was really a review of STAB's independent decision which, as will be shown, was different from the Department's final assessment. STAB ruled for Grace on a number of issues.

In a very recent decision, *Swan Corp. v. Mont. Dept. of Rev.*, (Mont. 1988), __ P.2d __, 45 St. Rep. 998, this Court clearly stated the standards for its review of a District Court's review of an administrative decision:

---

[22] The State Tax Appeal Board was created pursuant to Art. VIII, § 7, 1972 Montana Constitution which provides:

> **Tax appeals.** The legislature shall provide independent appeal procedures for the taxpayers grievances about appraisals, assessments, equalization, and taxes. . .

The general composition, duty and authority of the Board are set forth in Chapter 2, Title 15, MCA.

The District Court's review of the [Board's] Final [p. 59] was prescribed by sec. 2-4-704, MCA:

> '(1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
>
> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced . . ."
>
> The [district] court used as its guide *City of Billings v. Billings Fire Fighters Local Number 521* (1982), 200 Mont. 421, 651 P.2d 627, in which this Court said judicial review of an agency decision under sec. 2-4-704, MCA, is govern by two basic standards. Findings of fact will be upheld unless they are 'clearly erroneous,' and conclusions of law will be upheld unless they are an 'abuse of discretion.' **An abuse of discretion results if an agency's interpretation of a statute is clearly contrary to the legislative intent behind that statute.** *City of Billings*, 651 P.2d at 632; see *Montana Tavern Ass'n v. State* (Mont. 1986), 729 P.2d 1310, 43 St. Rep. 2180; *Terry v. Board of Regents of Higher Education* (Mont. 1986), 714 P.2d 151, 43 St. Rep. 304. *These standards will also apply to our review of the District Court.* (Emphasis supplied.)

The decision of the State Tax Appeal Board is Appendix A. The decision of the District Court is Appendix B. The decision of the District Court in response to Grace's Petition for Rehearing is Appendix C.

In *Dept. of Revenue v. Grouse Mt. Development*, (Mont. 1985) 707 P.2d 1113, 1115, 42 St. Rep. 1642, ___, this Court stated:

> The District Court as a reviewing court may reverse or [p. 60] modify the decisions of the State Tax Appeal Board and remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are clearly erroneous in view of the reliable, probative and substantial evidence of the whole record or are arbitrary, capricious or characterized by an abuse of discretion. Section 2-4-704, MCA. *This Court, however, has stated that it is not a judicial function to act as an authority on taxation matters.* Tax appeal boards are particularly suited for settling disputes over the appropriate valuation of a given piece of property, and the judiciary cannot properly interfere with that function.
>
> (Citations omitted) .... (Emphasis supplied.)

The District Court proceedings were not a **de novo** trial.

> Findings of fact by an agency [STAB] are binding on the court 'if there is substantial, credible evidence in the record ... *Appellants have the burden of showing their rights were substantially prejudiced by an arbitrary or capricious or clearly erroneous agency [STAB] decision.* (Emphasis supplied.)

Caruthers v. Board of Horse Racing of Dept. of Commerce, (Mont. 1985), 700 P.2d 179, 42 St. Rep. 729.

The District Court demonstrated that it understood the legal standards for review of an administrative decision and in carefully reasoned opinions applied those standards to this case. In its Order Re: Rehearing, the District Court stated:

> While conceding the Montana Supreme Court has stated that conclusions of law of an administrative agency are subject to the 'abuse of discretion' standard,

> Petitioner argues this is a 'non-rule,' and that STAB has misinterpreted the applicable statutes and thus 'abused its discretion.' The Court finds no merit in this contention. As stated in the order of March 4, 1988, STAB's findings of fact were supported by substantial credible evidence in the record, and STAB's conclusions of law based on the findings of fact were not an abuse of discretion. The party challenging the agency's decision bears the burden of proof showing his or her rights were substantially prejudiced by an arbitrary, capricious or clearly erroneous agency decision; *Petitioner [Grace] in this case did not meet* [p. 61] *its burden of proof.* (Emphasis supplied.)

Grace bears the same burden before this Court and, again, as was explained above, it has not met its burden of proof.

APPENDIX K

DAVID W. WOODGERD
Chief Legal Counsel
GERALYN DRISCOLL
Tax Counsel
DEPARTMENT OF REVENUE
Office of Legal Affairs
Mitchell Building
Helena, Montana 59620-2702
(406) 444-2852

MONTANA FIRST JUDICIAL DISTRICT,
LEWIS AND CLARK COUNTY

* * * * * * * * *

PACIFICORP, an Oregon corporation, Petitioner, —vs— DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, AND THE STATE TAX APPEAL BOARD of the STATE OF MONTANA Respondents.	No. CDV 89-344 AFFIDAVIT IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

* * * * * * * * * * * * * *

STATE OF MONTANA)
: ss.
County of Lewis and Clark)

DAVID W. WOODGERD, being first duly sworn says:

1. I am the Chief Legal Counsel for the Montana Department of Revenue and a Special Assistant Attorney General for the State of Montana.

2. I represented the Department of Revenue and the State of Montana in all matters involving this case. This included proceedings before the State Tax Appeal Board and an interlocutory appeal to the District Court.

3. A hearing in this case was conducted before the State Tax Appeal Board May 16 through May 20, 1988. Prehearing Memorandums were submitted by both parties.

4. On September 19, 1988, PacifiCorp submitted a 40 page Opening Brief with additional appendices.

5. The Department submitted a 47 page Posthearing Brief on January 3, 1989.

6. PacifiCorp submitted a 37 page Reply Brief with an appendix containing additional argument on February 3, 1989.

7. The Department had no ex parte contact with the Board during these administrative proceedings. The only contact with STAB regarding the substantive issues in this case, other than as described above, occurred after STAB had reached a decision. This contact is fully described below.

8. On or about February 9, 1989, I received a telephone call from Dale Dean, who was Chairman of the State Tax Appeal Board. Chairman Dean said that he was calling to inform me that the Board had decided this case in favor of the Department.

9. After informing me that the Department had prevailed before the Board, Chairman Dean requested the Department to prepare a draft decision document for review by the Board.

10. Pursuant to his request, I agreed to draft a decision document for STAB's review. Chairman Dean dictated the basis of the Board's decision. He told me that the Board ruled in the Department's favor because a unitary business did not exist. Additionally, he said that the Board's decision document would not discuss the alternative basis for the assessment asserted by the Department.

11. Pursuant to the request, I drafted findings of fact, conclusions of law, discussion and order and submitted the draft document for STAB's review on or about February 22, 1989.

12. As the affidavit of Cleo Anderson states, STAB requested and received a copy of the draft document on computer disc for ease in editing.

14. The State Tax Appeal Board issued findings of fact, conclusions of law, discussion and order in this case on February 28, 1989.

15. The document issued by the Board while not identical to the document submitted by the Department is substantively very similar. The document was reprinted and I have not reviewed it to see what changes were made from the draft.

16. In 1984 and 1985, I was the attorney for the Department before STAB and the District Court in *HELMMCO Inc. v. DOR*, Lewis and Clark County Cause no. 50827.

17. The attorney representing HELMMCO raised exactly the same issue before the District Court as raised by PacifiCorp. The facts are identical except for the parties involved. The affidavit which I submitted to the District Court in that case is attached to this affidavit.

18. In the attached HELMMCO affidavit, I state that Helen Peterson, who was a STAB member at the time, requested that I draft the proposed findings of fact and conclusions of law.

19. I also state in the HELMMCO affidavit that I drafted the proposed document and submitted it for their review.

20. Further, the HELMMCO affidavit states that Helen Peterson "informed the parties that in complex cases the prevailing party may be asked to write the decision document."

21. I know that attorneys for both the taxpayer and the Department, depending upon who prevailed, have on occasion written proposed decisions for the Board.

DATED this 18th day of May, 1989.

BY: /s/ David W. Woodgerd

State of Montana)
: ss.
County of Lewis and Clark)

On this ____ day of May, 1989, before me a Notary Public for the State of Montana, personally appeared DAVID W. WOODGERD known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

[SEAL]

/s/ Harley E. Warner
Notary Public for the
State of Montana
Residing at Helena, Mt.
My Commission Expires:
March 31, 1991

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

HELMMCO, INC., a Delaware Corporation,	)	
Petitioner,	)	
—vs—	)	No. 50827
DEPARTMENT OF REVENUE and the STATE TAX APPEAL BOARD, of the State of of Montana,	)	
Respondents.	)	

AFFIDAVIT

DAVID W. WOODGERD, being first duly sworn says:

1. I am an attorney for the Montana Department of Revenue and represented the Department before the State Tax Appeal Board in this case.

2. At the hearing on April 12, 1984 before the Board both parties presented evidence and made oral arguments concerning all aspects of the controversy. The parties had previously submitted extensive briefs concerning the legal issues.

3. At the conclusion of the hearing, Helen Peterson informed the parties that it was not the practice of the Board to accept proposed Findings of Fact and Conclusions of Law and that they would not be accepted in this case. She also informed the parties that in complex cases the prevailing party may be asked to write the decision document.

4. The attorneys for Helmmco, Mr. Massman and Mr. Rusek, did not object at that time to the announced possibility that the prevailing party may be requested to write the decision document.

5. Late in the afternoon of April 12, 1984, following the subject hearing, I received a telephone call from Mrs. Peterson. I was informed that the State Tax Appeal Board had reached a decision in favor of the Department in the subject case. Mrs. Peterson requested that I write a proposed decision document for the Board.

6. I drafted a proposed decision document and submitted it to the Board with the April 26, 1984 cover letter which is attached to Helmmco's petition.

By: /s/ David W. Woodgerd
DAVID W. WOODGERD

State of Montana)
ss.
County of Lewis and Clark)

On this 17th day of June, 1985, before me a Notary Public for the State of Montana, personally appeared David W. Woodgerd, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

[SEAL]

/s/ Cleo Anderson
Notary Public for the
State of Montana
Residing at Helena
My Commission Expires:
May 23, 1986

APPENDIX L

Excerpted Questions and Answers
From the Deposition of David Woodgerd,
Chief Legal Counsel of
the Montana Department of Revenue
in *PacifiCorp. v. Department of Revenue*,
Montana First Judicial District,
Lewis and Clark County,
Case No. CDV-89-344,
June 6, 1989

P. 22 (lines 8-25) through P. 23 (lines 1-20)

Q. So you don't have any recollection. Okay. You said you spoke with attorneys in your office to acquaint yourself further with their experience on requests from STAB?

A. Yes, as a result of your — I guess in Mike Rieley's letter, he called it an Interrogatory. In order to comply with your request on that, I did do that.

Q. Which attorneys did you speak to?

A. I spoke to Bruce McGinnis and Paul VanTricht.

Q. There are other attorneys who are in the Department, too, aren't there?

A. Certainly.

Q. Is there a reason you didn't speak to them?

A. Eric Fehlig has not practiced that much in front of the State Tax Appeal Board. He mainly does Liquor work. Geralyn is fairly new, and not as familiar with her work in front of the State Tax Appeal Board.

Q. So you didn't need to speak to her.

A. Right; and Larry Schuster isn't returning my phone calls these days.

Q. What did Mr. McGinnis tell you on the subject of his experience?

A. I asked Mr. McGinnis what he could recall. I did make some notes here, which I'm happy to let you see or make a copy of.

Q. I would appreciate that. Thank you.

A. Mr. McGinnis indicated that, going back probably at least ten years, he had written opinions for the State Tax Appeal Board. What he could recall, he could recall some tax protestor cases, one which he called the Alison, A-L-I-S-O-N, case, and he said there were probably other cases involving tax protestors, and in those cases, he had written opinions, one or more opinions for the State Tax Appeal Board. There's a case called Froehman (phonetic), an income tax case, that he had written an opinion; a case involving residency, but he didn't remember the name of it; and an Anaconda Company case. Those were the cases that he recalled in which he himself personally wrote an opinion, or wrote findings of fact and conclusions of law.

* * *

P. 24 (lines 14-25) through P. 25 (lines 1-24)

Q. Let's go on to Mr. or Ms. VanTricht.

A. Mr. VanTricht. He indicated he had written, as far as he could recall, five findings of fact and conclusions of law for the State Tax Appeal Board, a case called SOMONT, S-O-M-O-N-T; VanderPas, V-A-N-D-E-R-P-A-S; W.R. Grace; Mountain State Resources; Tricentrol, T-R-I-C-E-N-T-R-O-L. That's all he could recall that he had prepared.

Q. How about Ms. Driscoll? Since you're familiar with her work, what has she done in that regard?

A. One case, Jewell.

Q. How about yourself?

A. I can only recall three cases. The first case was a case involving a Sub S corporation, and I don't remember the name of the taxpayer. The second case was Helmmco, and the third case was this one.

Q. In Helmmco, I gather from your affidavit that STAB did state in court that it would ask the prevailing party to prepare findings of fact and conclusions of law; is that consistent with your recollection?

A. To be honest with you, I didn't recollect that until I actually read my affidavit, but that's what my affidavit says, and I'm sure I told the truth.

Q. Did you ask Mr. VanTricht whether STAB made any such pronouncement or statement in the five cases that he listed?

A. No, I didn't ask him.

Q. Do you know whether STAB made any such pronouncement in the — Strike that. So you don't know whether or not STAB said any such thing in the VanTricht cases?

A. No, I don't.

Q. How about Ms. Driscoll?

A. In the Jewell case, Geralyn prepared the document. However, she did not participate in the trial. In fact, she did not take the call from the State Tax Appeal Board.

Q. Did you?

A. Yes, Excuse me. I took the call. I did not participate in the trial.

* * *

P. 26 (line 7) through P. 29 (line 13)

Q. In the Jewell case, you took the call. Who was it from?

A. Dale Dean.

Q. When was that approximately?

A. It was approximately within – I believe it was prior to the call on Pacificorp, which I think I said in my affidavit was February 9, on or about February 9.

Q. Yes, you did.

A. So, I would say around the first of February.

Q. What did Mr. Dean tell you in the Jewell case that he wanted you to do?

A. Mr. Dean said, "I called to tell you that the Board will be deciding the Jewell case in favor of the Department, and I would –" I can't recall his exact words, but something to the effect that he requested that we write findings of fact, conclusions of law and order.

Q. Did he give you any guidance as to what should or should not be in those findings of fact or conclusions of law?

A. To some extent, yes. He indicated that the Board had discussed the case, and their decision was based upon a specific portion of the last brief that had been written, I believe, and that the argument contained in there had been persuasive in their judgment, and requested that that be the basis of the decision. I couldn't even recall now what portion of the brief it was. I then assigned that, or asked Geralyn if she would prepare those findings based on that.

Q. To your knowledge, she did so.

A. Yes.

Q. To your knowledge, she submitted them to STAB.

A. Yes.

Q. To your knowledge, is it correct that she did not submit a copy of the as-prepared draft to opposing Counsel?

A. Yes, that's correct.

Q. In your call with Mr. Dean about the Jewell case, did he instruct you not to submit a copy to opposing Counsel?

A. Not that I recall, no.

Q. Has anyone from STAB ever instructed you in this type of situation, the type of situation we're talking about, not to submit a copy of the draft that's going to STAB to opposing Counsel?

A. I would answer that by saying that, for instance, in the Helmmco case, as you can tell by reading through the file, I transmitted the proposed document to STAB with a letter, and I believe it was Mr. Raundal at the time indicated to me in a conversation afterwards, probably considerably afterwards, that it would have been more appropriate if I had simply d[illegible]pped it off rather than sending it with a transmittal letter.

Q. Mr. Raundal I gather was a STAB member?

A. He was the Chairman of the State Tax Appeal Board at the time.

Q. Did you inquire of him why that would be more appropriate?

A. I don't recall.

Q. Was it more appropriate because — Strike that. Isn't it a fact that the way that the unilateral submission to STAB came to light in the Helmmco case was the letter that was found in the Department's files?

A. No.

Q. What ~~is the fact~~ in that regard?

A. The transmittal letter was discovered by Mr. Rusek in STAB's files.

Q. Thank you. Raundal is R-A-U-N-D-A-L?

A. Yes.

Q. Was it your understanding at the time that Mr. Raundal wanted you simply to drop these things off in order to reduce the ability of opposing Counsel to find out about this practice?

A. I'm not sure I can testify about Mr. Raundal's motives.

Q. I asked you for your understanding of his motive at the time.

A. Would you repeat the question?

Q. Was it your understanding at the time that the reason he wanted you to simply drop them by rather than send them with a cover letter was to reduce the ability of opposing Counsel to discover that they had been submitted?

A. I guess my understanding was that in fact Mr. Raundal at least, who was as I said Chairman of the State Tax Appeal Board, felt that it would have been better if there wasn't a transmittal letter so that opposing Counsel would not have been aware of the fact that the Department had in fact prepared the findings in the Helmmco case.

* * *

P. 37 (lines 9-25) through P. 38 (line 1)

Q. Were you concerned after your discussion with Mr. Raundal that any form — Strike that. Were you concerned after your discussion with Mr. Raundal that some form of sanction would be entered against you personally, or other attorneys in your department, or against the Department per se, or against the State of Montana, if you did not do what Mr. Raundal requested, but did continue to use transmittal letters or provide copies to opposing Counsel?

MS. DRISCOLL: Can I get a definition here from you before he answers? When you say "sanctions," are you talking about sanctions under the Rules of Civil Procedure? What do you mean by sanctions?

Q. (By Mr. Jarvis) Any form of sanction or punishment or retribution or whatsoever, either a formal court-ordered sanction, or a sanction in the form of STAB being less likely to rule in the Department's favor, or any other form of sanction, or harm to the attorneys in the Department, the Department itself or the State of Montana.

* * *

P. 38 (lines 8-16)

A. I guess I don't know whether I thought there would or would not be sanctions, but I wasn't willing to take the risk.

Q. Did you think about this subject, whether there would or would not be sanctions, at the time of your conversation with Mr. Raundal?

A. Only in the sense that I was anxious to —

Q. Please?

A. — please the State Tax Appeal Board, because I needed to practice in front of them.

* * *

P. 43 (lines 19-25) through P. 44 (lines 1-7)

Q. Is it fair to say then that your knowledge of those cases [in which taxpayers were directed to prepare STAB's opinion] would be hearsay?

A. I think the knowledge of any cases except the ones where I took the phone call are probably hearsay; and I also would add that I couldn't really possibly have any other knowledge of cases in which taxpayers' Counsel had been requested to write the opinion other than hearsay knowledge because it's STAB's, essentially, policy, that as far as I know everybody follows, of not informing opposing Counsel when they do that.

Q. When you say as far as you know, why do you say as far as you know?

A. Because I've never had or heard of opposing Counsel ever informing opposing Counsel that this occurred.

* * *

P. 79 (lines 21-25) through P. 80 (lines 1-23)

Q. After you got the call from STAB, did you understand – Strike that. After you got the call from STAB, were you the one that actually prepared the draft findings of fact and conclusions of law?

A. In this case, yes.

Q. Did anybody help you?

A. Substantively no. Obviously typing, etc.

Q. Did you tell anybody that you'd heard from STAB?

A. Yes.

Q. Who?

A. Jerry Foster, Jeff Miller –

Q. Did you tell your wife, for example?

A. I don't remember.

Q. You could have, or you couldn't have; you generally don't recall?

A. I don't normally – Well, who knows? I don't recall.

Q. Did you tell anybody other than Foster, Miller, and did you mention a third person?

A. I believe I was going to say the attorneys or the people in the office of Legal Affairs.

Q. Of the Department of Revenue.

A. Of the Department of Revenue. I don't recall whether I did or I didn't, but the chances are too that I did.

Q. Would you likely have told them within a day or two of the time that you got the call from STAB?

A. Probably.

Q. Did you instruct any of them not to inform Pacificorp that you received this call?

* * *

P. 81 (lines 5-25) through P. 82 (lines 1-10)

A. I didn't instruct any attorney not to contact Pacificorp.

Q. Did you undertake to contact Mr. Cosgrove [counsel for Pacificorp] or anyone at Pacificorp?

A. No.

Q. Why not?

A. Because of STAB's practice, and the fact that the practice has been sanctioned by the First Judicial District in the Helmmco case, which was that the other side — that these were drafts, this was a draft decision, as stated by Ms. Helen Peterson. It's a draft decision for their review, and that's the way it should be treated.

Q. When you say STAB's practice, do you really mean your conversation with Mr. Raundal?

A. We discussed a conversation with Mr. Raundal which I guess is part of it, but it was STAB's practice as I was aware of what STAB practice was.

Q. Mr. Raundal's comments to you were the only basis in fact for your not even doing something as simple as using a transmittal letter to STAB?

A. I don't think that's a fair statement, no.

Q. What other basis was there?

A. What other basis for what exactly?

Q. Not even using a transmittal letter for STAB, or not informing Counsel that you'd been contacted by STAB, or not providing opposing Counsel with a copy of your draft.

A. As far as not using a transmittal letter, I guess that probably came from Mr. Raundal. As far as the other parts of your question, where exactly that came from, I'm not sure, probably several sources in terms of my understanding of STAB's practice.

* * *

P. 92 (line 21) through P. 94 (line 20)

Q. In terms of the appeal, would it not have been helpful to — Strike that. You say in your affidavit that you submitted the proposed findings of fact or conclusions of law, or draft as you refer to it, to the Department, you say, on or about February 22. Can you date it any more —

MS. DRISCOLL: To STAB?

Q. (By Mr. Jarvis) To STAB. Can you date it any more specifically than that?

A. If that's what I said in my affidavit, that's what I said in my affidavit. The 22nd is the 22nd.

Q. Do you also recall a meeting with John Shepard [representative of Pacificorp] on or about February 22?

A. I don't know what — I recall visiting with Mr. Shepard in the meeting room of the Director's Office, but I thought that that was at some other point in time, not around February 22.

Q. When did you think it was?

A. At some point before that, a few days.

Q. A few days anyway.

A. A couple days.

Q. But I take it if Mr. Shepard's travel records were to establish that he was here on that day and not on other days, you would defer, so to speak?

A. I don't think Mr. Shepard lies about his travel records, but I would certainly want to do some checking.

Q. That's fine. I'd appreciate it if you would do so, in fact.

A. If he'd submit his travel records to me, I'd certainly do that.

Q. At that time, Mr. Shepard inquired of you, did he not, about the status of the proceeding?

A. The status of the proceeding?

Q. Yeah, whether you'd heard anything, when you expected to hear anything, the status of the proceeding.

A. We had a discussion about the proceeding, yeah. Whether he asked me that question, I don't recall.

Q. Isn't it a fact that he asked you if you thought you'd hear soon?

A. Very possibly. I don't recall specifically whether he asked that or not.

Q. Isn't it a fact that he asked if you thought the case would be decided by March 1?

A. Probably. I don't recall. I don't know.

Q. Isn't it a fact that you did not tell Mr. Shepard that the Department had been asked – that you in fact had been asked by STAB to prepare findings of fact and conclusions of law?

A. That's right.

Q. Why is that?

A. Because of STAB's practice.

* * *

P. 95 (lines 22-25) through P. 96 (lines 1-7)

Q. In fact, you told Mr. Shepard that the normal procedure was that STAB would contact the prevailing party; is that correct?

A. Yes.

Q. In fact, you told him that the normal procedure is that the losing party doesn't also get notified?

A. I probably told him that, yeah.

Q. But you didn't specifically tell him in this case that you had in fact been contacted, and that if — is that correct?

A. That's true. I did not tell him that.

* * *

P. 96 (lines 23-25) through P. 97 (lines 1-22)

Q. Would a reasonable inference from what you said to Mr. Shepard be that you hadn't heard anything from the Department?

A. No. In fact, I think just the opposite. I think if Mr. Shepard was listening, I think what I told him was that, as you said, what the procedure was, exactly what the practice was. I informed him of what the practice was, and I think I also indicated that there was a good possibility that the Board would want to decide it before Mr. Dean left, and I think I also made clear that it was STAB's wish that opposing Counsel not be notified, but that given the date and time, in fact I assumed that Mr. Shepard would probably figure out that we in fact had been notified.

Q. I didn't ask you even what — Strike that. So it's your testimony that it was unreasonable of Mr. Shepard not to have understood that you had in fact been contacted, and had in fact been asked to draft proposed findings of fact and conclusions of law?

A. No, no, no, not at all. I didn't say that.

Q. And in fact, if Mr. Shepard was here on February 22nd, it was too late by then for Pacificorp to do anything, wasn't it?

A. I guess the answer to that is: He was too late when you filed your State Tax Appeal Board appeal five years ago, because that was the practice.

No. 89-901

MOTION FILED JAN 5 1990

IN THE

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OCTOBER TERM, 1989

W.R. GRACE & CO.—CONN.,
Petitioner,
v.

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AND THE MONTANA CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Committee on State Taxation of the Council of State Chambers of Commerce and the Montana State Chamber of Commerce hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the Attorney for the Petitioner has been obtained. The consent of the Attorney for the Respondent was requested and refused, although it was represented that the Respondent would not oppose this motion.*

---

* The consent of the Petitioner and response of the Respondent have been filed with the Clerk of this Court.

The Montana Chamber of Commerce (Chamber) has approximately 1,000 members and includes small and large businesses located in Montana. The Chamber's purpose is to achieve a strong economic environment in Montana which will promote growth and development in the State. The Chamber is, therefore, involved in all issues impacting Montana businesses, including tax issues, and is greatly concerned with maintaining the fairness and integrity of Montana's tax system. Since all of its members are affected by the State's tax system, the Chamber has a considerable interest in insuring that its members have access to a fair and impartial hearing procedure when disputes regarding the State's tax system arise.

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of commerce, including the Montana Chamber of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the Council, consists of 330 corporate members, including petitioner, who conduct a substantial portion of the interstate commerce of United States taxpayers. COST's objective is to preserve and promote equitable and non-discriminatory state and local taxation of corporations doing business in more than one taxing jurisdiction. This objective is accomplished, in part, through the promotion of procedural rights of taxpayers so that when a dispute arises with a taxing jurisdiction the taxpayer is given a full and fair opportunity to contest the legality of the state's action. COST is, therefore, vitally interested in cases such as the instant case in which the State of Montana's tax litigation process operates in such a way so as to deny taxpayers their procedural due process rights.

At issue in this case is a taxpayer's fundamental right to a full and fair hearing before an impartial decisionmaker in contested tax cases as protected by the Fourteenth Amendment. In this, and other cases, STAB, with the complicity of the Department of Revenue, has vio-

lated taxpayers' due process rights by its procedure of secretly contacting the Department of Revenue and requesting the Department to draft the findings and order to be adopted by STAB and purposely denying taxpayers notice of the *ex parte* contacts and the opportunity to fully and equally present their cases.

The denial of due process rights in contested tax cases is an issue affecting all Montana taxpayers. Thus, this issue is of major importance to COST and the Chamber. COST and the Chamber therefore urge that leave be granted to file a brief as *amici curiae* in support of Petitioner's petition for writ of certiorari and respectfully so move the Court.

Respectfully submitted,

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Dated: January 5, 1990

TABLE OF CONTENTS

	Page
INTRODUCTORY STATEMENT	1
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THE ADOPTION OF FINDINGS AND ORDER SUBMITTED TO A DECISION-MAKER *EX PARTE* VIOLATES THE RIGHT TO A FAIR HEARING UNDER THE DUE PROCESS CLAUSE	3
CONCLUSION	7

TABLE OF AUTHORITIES

Cases	Page
Aiken County v. BSP Div. of Envirotech Corp., 866 F.2d 661, *rehearing denied* (4th Cir. 1989)	6
Anderson v. City of Bessemer, 470 U.S. 564 (1985)	5
Bradley v. Maryland Casualty Company, 382 F.2d 415 (8th Cir. 1967)	6
Chicopee Mfg. Corp. v. Kendall, 288 F.2d 719 (4th Cir.), *cert. denied*, 368 U.S. 825 (1961)	5, 6
Doe v. Hampton, 566 F.2d 265 (D.C. Cir. 1977)	3
In re Colony Square, 819 F.2d 272 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1271 (1988)	5, 6
Lassiter v. Department of Social Services of Durham County, N.C., 452 U.S. 18, *rehearing denied*, 453 U.S. 927 (1981)	3
Lloyd Carr & Co. v. Commodity Futures Trading Commission, 567 F.2d 1193 (2d Cir. 1977)	3
Marshall v. Jerrico, Inc., 446 U.S. 238 (1980)	3
Pacificorp v. Department of Revenue and State Tax Appeal Board, Montana First Judicial District Court, No. CDV-89-344, Slip Op. (November 21, 1989)	2
Withrow v. Larkin, 421 U.S. 238 (1975)	3

Constitutional Provisions, Statutes and Other Authorities	
U.S. Const., amend. XIV	2, 7
Montana Code Ann. 2-4-613	2, n.
ABA Code of Judicial Conduct Canon 3(A)(4)	4, n.
Model Code of Professional Responsibility EC 7-35	3, n.

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AND THE MONTANA CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce and the Montana Chamber of Commerce as *amici curiae* in support of the petitioner's petition for writ of certiorari in the above-captioned case.

INTEREST OF *AMICI CURIAE*

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce and the Montana Chamber of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amici Curiae*.

SUMMARY OF ARGUMENT

This case presents an issue of major importance to all taxpayers. Disputes between taxpayers and taxing authorities will always exist. Therefore, it is essential, and a Constitutionally protected right, that taxpayers have available to them an impartial forum in which they may have those disputes adjudicated. It is further essential, and a Constitutionally protected right, that this impartial forum afford taxpayers a full and fair opportunity to present their cases. The procedure used by the Montana State Tax Appeals Board (STAB) in this case, in which it contacted the Department of Revenue (Department) *ex parte*; made a secret request to the Department to draft the findings and order; and adopted those findings and order without any notice to the taxpayer, denies the taxpayer its due process rights under the Fourteenth Amendment to the United States Constitution by tainting the impartiality of the proceeding and denying the taxpayer a full opportunity to be heard.

Ex parte communications to a decision-maker are prohibited as fundamentally at variance with due process rights. The *ex parte* contacts that took place in the instant case had the effect of abrogating the role of the impartial decision-maker and denying taxpayer its right to a full and fair hearing. Further, this not an isolated instance in that STAB has used this procedure to deny due process rights to taxpayers other than the petitioner in this case. See, *Pacificorp v. The Department of Revenue and State Tax Appeal Board*, Montana First Judicial District Court, Lewis and Clark County, No. CDV-89-344 Slip Op. (11/21/89).[1] It is necessary that this Court clarify that actions such as those taken by STAB are not consistent with due process and to assure that all taxpayers are given a fair opportunity to present their

[1] In this case, the District Court vacated and remanded STAB's decision in favor of the Department because the *ex parte* contacts violated Montana Statutes Section 2-4-613.

cases and have those cases decided in an open, unbiased hearing.

ARGUMENT

THE ADOPTION OF FINDINGS AND ORDER SUBMITTED TO A DECISION-MAKER *EX PARTE* VIOLATES THE RIGHT TO A FAIR HEARING UNDER THE DUE PROCESS CLAUSE

Due process expresses the requirement of fundamental fairness. *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, *rehearing denied*, 453 U.S. 927 (1981). The due process clause entitles a person to an impartial and disinterested tribunal in civil cases. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). The principle that a fair trial in a fair tribunal is a basic requirement of due process applies to administrative agencies which adjudicate as well as to courts. *Withrow v. Larkin*, 421 U.S. 35 (1975). The requirements of due process mandate that an administrative hearing will constitute a fair trial conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. *Lloyd Carr & Co. v. Commodity Futures Trading Commission*, 567 F.2d 1193 (2d Cir. 1977). It has been recognized that ". . . ex parte communications by an adversary party to a decision-maker in an adjudicatory proceeding are prohibited as fundamentally at variance with our conceptions of due process." *Doe v. Hampton*, 566 F.2d 265, 276 (D.C. Cir. 1977).[2]

---

[2] This is recognized by the practicing bar and the judiciary. The Model Code of Professional Responsibility EC 7-35 (1980) provides:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, *a lawyer should not communicate with*

The procedure used by STAB and the Department in this and other tax cases flagrantly violates the standards set forth above. The procedure is patently unfair to the taxpayer. STAB does not allow each litigant an equal opportunity to present their case through the submission of proposed findings of fact and decision, served on the opposite side with an opportunity to respond. Rather, after the hearing, it secretly contacts the Department and asks the Department to draft the findings and order, which are never shown to the taxpayer prior to their adoption by STAB as its final decision. Even then, the taxpayer is never told that the Department's attorney prepared STAB's findings and order. The taxpayer is not allowed an equal opportunity to present its case or a full opportunity to respond to the case presented by the Department. Thus, the one-sided case presented by the Department in secret becomes STAB's decision when it adopts the findings and order prepared by the Department.

This Court has recognized the dangers inherent in a court's verbatim adoption of findings of fact prepared by prevailing parties in that a great potential for overreaching and exaggeration on the part of the attorneys preparing the findings is created when they have already been informed that the judge has decided in their favor. *An-*

> *a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer.* Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client. (Emphasis added.)

Similarly, the Code of Judicial Conduct for United States Judges Canon 3(A)(4) (1979) provides, in part:

> A judge should . . . neither initiate nor consider *ex parte* . . . communications concerning a pending or impending proceeding.

derson v. City of Bessemer, 470 U.S. 564 (1985). Such overreaching and exaggeration have a lasting prejudicial impact on the losing party. Since, on review, the reviewing court is bound by the findings of the lower court that are applied in reaching a legal determination, the losing party has no real opportunity to respond to the factual findings and faces an insurmountable burden on appeal. The essence of a hearing is that it is the forum for parties to be heard regarding the facts of their case. Here, however, STAB has denied taxpayers that forum.

Further, a proposed order or opinion serves as an additional opportunity for a party to brief and argue its case and thus is unfair to the party not accorded an opportunity to respond. *In re Colony Square*, 819 F.2d 272 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1271 (1988). Again, STAB's procedure of secretly contacting the Department in order to have the Department draft its findings and opinion denies a taxpayer its opportunity to present its caes and, therefore, creates a situation so fundamentally unfair so as to violate the taxpayer's right to due process.

This Court has not addressed whether a procedure such as that used by STAB violates due process. In *Anderson v. City of Bessemer*, *supra*, in which this Court did not find any procedural violation resulting from the court's use of findings prepared by the prevailing party, the other party was provided and availed itself of the opportunity to respond to the findings submitted by the prevailing party. Thus, the secret *ex parte* contacts that are at the heart of the constitutional violation by STAB were not present in *Anderson*. Much closer to the instant case is *Chicopee Mfg. Corp. v. Kendall*, 288 F.2d 719 (4th Cir.), *cert. denied*, 368 U.S. 825 (1961). In this case, a preliminary order was issued after both parties filed briefs setting forth applicable principles of law and findings of fact in general terms. However, one month later, an elaborate opinion with specific findings of fact was filed which had been prepared by the attorneys of the

plaintiff upon the request of the judge without notice to the attorneys for the defendant. The judge adopted the findings and opinion without material change. The Circuit Court stated that the practice of the adoption of findings of fact and conclusions of law submitted by the successful party

> involves the failure of the trial judge to perform his judicial function and *when it occurs without notice to the opposing side, as in this case, it amounts to the denial of due process.* (emphasis added; 288 F.2d at 724, 725.)

The procedure used by STAB goes well beyond any of the *ex parte* procedures that have been upheld by the federal courts of appeals. *In re Colony Square Co., supra,* involved a bankruptcy proceeding motion which was extensively briefed by both parties. Although the order signed by the judge was essentially identical to the order prepared by the prevailing party after an *ex parte* contact from the judge, the judge had outlined to the prevailing counsel what he wished the order to say. Thus, in this case, the judge had already reached a firm decision and had played an active role as the decision-maker and had given both sides ample opportunity to present their arguments. In *Bradley v. Maryland Casualty Company,* 382 F.2d 415 (8th Cir. 1967), the Court stated that, while the record was unclear as to what actually occurred, the findings and conclusions at issue were carefully drawn, in detail and related specifically to evidence in the record so that it could conclude that the trial judge had considered the evidence, witnesses and the case in general himself in reaching a decision. *Aiken County v. BSP Div. of Envirotech Corp.,* 866 F.2d 661, *rehearing denied* (4th Cir. 1989), involved the court's adoption, nearly verbatim, of proposed findings of fact and conclusions of law prepared by the prevailing party. However, in this case, the court announced its tentative findings in open court after a 52-day trial and publicly instructed both parties to submit findings of fact and conclusions

of law. Thus, while the losing party did not see the prevailing party's proposed findings and order prior to their adoption, it knew of the submission by the opposing side. None of these cases involve the type of secret *ex parte* contacts that take place between STAB and the Department.

It is imperative that both parties to litigation have a full and fair opportunity to present their cases before an impartial decision-maker. This is a right protected by the Fourteenth Amendment of the United States Constitution. STAB's conduct in contacting the Department *ex parte* in order to have the Department secretly prepare its decisions, and the Department's complicity in this procedure, clearly violates that right.

CONCLUSION

For the foregoing reasons, COST and the Chamber urge this Court to grant Petitioner's Petition for Writ of Certiorari in this case.

Respectfully submitted,

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No. 89-901

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Should this Court grant a Petition for Certiorari when:

1. The record of the case does not contain any basis for the allegations raised in the Petition?

2. The Petitioner created a very incomplete and inaccurate "record" from bits and pieces of depositions and materials from other cases?

3. The Petitioner did not timely raise the issue before the state courts?

LIST OF PARTIES AND RULE 29.1 STATEMENT

The undersigned, counsel of record for Montana Department of Revenue, certifies that the following have an interest in the outcome of this case:

State of Montana

Montana University System

Montana Office of Public Instruction

Lincoln County Government, Lincoln County, Montana

School District #4, Lincoln County, Montana

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.1 STATEMENT... ii

TABLE OF CASES AND AUTHORITIES..... iv

JURISDICTION..... 1

STATEMENT OF THE CASE..... 2

SUMMARY OF ARGUMENT..... 8

REASONS WHY THE PETITION SHOULD BE DENIED 9

Grace Did Not Timely Raise the Issue Before the State Courts – The Record Does Not Support Grace's Petition 9

No Significant Due Process Issue Has Been Raised by the Petition – Federal Court Have Rejected Grace's Argument 11

CONCLUSION 15

APPENDIX..... 1a

TABLE OF CASES AND AUTHORITIES

Page

CASES

Aiken County v. BSP Div. of Envirotech Corp., 866 F.2d 661 (4th Cir., 1989) 12

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 12

Anderson v. City of Bessemer, N.C., 717 F.2d 149 (4th Cir., 1983) 12

Bradley v. Maryland Casualty Company, 382 F.2d 415 (8th Cir., 1967) 12, 13

Cardinale v. Louisiana, 394 U.S. 437 (1969)..... 9

Chicopee Manufacturing Corp. v. Kendall Company, 288 F.2d 719 (4th Cir., 1961) 12

Dept. of Revenue v. Countryside Village, 667 P.2d 936 (Mont. 1983) 7

Department of Revenue v. Grouse Mountain Development, 707 P.2d 1113 (Mont. 1985) 7

Dept. of Revenue v. St. Tax Appeal Bd., 613 P.2d 691 (Mont. 1980) 7

DeVoe v. Dept. of Revenue of Montana, 759 P.2d 991 (Mont. 1988) 7

Helmmco, Inc. v. Department of Revenue, Montana First Judicial District, Lewis and Clark County, Cause No. 5082 (1985).....4, 11

Hi-Line Radio Fellowship v. Dept. of Rev., 737 P.2d 886 (Mont. 1987)..... 7

In re Colony Square Co., 819 F.2d 272 (11th Cir., 1987).....13, 14

TABLE OF CASES AND AUTHORITIES (Cont.)

Page

J. Burns Brown Operating Co. v. Department of Revenue, Montana First Judicial District, Lewis and Clark County, Cause No. ADV-89-555 2

Norfolk Energy, Inc. v. Department of Revenue, Montana Twelfth Judicial District, Hill County, Cause No. DV-89-089 ..... 2, 4

PacifiCorp v. Department of Revenue, Montana First Judicial District, Lewis and Clark County, Cause No. CDV-89-344 ..... 2, 10, 11

State Dept. of Revenue v. Paxson, 666 P.2d 768 (Mont. 1983) 7

Udall v. Tallman, 380 U.S. 1 (1965) 7

United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) 13, 14

United States v. Marine Bancorporation, 418 U.S. 602 (1974) 14

W. R. Grace & Company v. Department of Revenue, 779 P.2d 470 (Mont. 1989) 8

STATUTES AND RULES

28 USC § 1257(a) 1, 9

Rule 34, M.R.App.P. 1

Rule 3 M.R.App.P. 6

Mont. Code Ann. § 2-4-613 (1989) 11

JURISDICTION

Exception is taken to petitioner's statement that the amended petition for rehearing was filed on time. It was not timely filed with the Montana Supreme Court. The amended petition for rehearing, which raised the question presented in this Petition for the first time, was filed on September 12, 1989, at least 10 days late under the rules of the Montana Supreme Court.[1]

There is no jurisdiction under 28 USC § 1257(a).

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[1] Rule 34, M.R.App.P., provides "a petition for rehearing may be filed within 10 days after the decision of the supreme court has been rendered." Rule 34, M.R.App.P., is reprinted as Department's Appendix A, at 1a. The decision was rendered on August 18, 1989. The original petition for rehearing was filed on August 25, 1989. Grace's original petition for rehearing is reprinted as Department Appendix B, at 2a. That petition did not raise the issue presented in this Petition for Certiorari. Instead it raised for the first time two federal issues: 1) that the Montana Supreme Court "is denying taxpayer [Grace] due process of law and violating the commerce clause [to the U.S. Const.] by creating a new and additional test not imposed by the legislature;" and 2) that the Montana Supreme Court "by applying a different test [for the deductions under the Montana corporation income tax as opposed to the net proceeds tax] as to this taxpayer, has denied taxpayer equal protection of the law (Amendment XIV to the United States Constitution . . .) and violated taxpayer's constitutional rights under Article I, Paragraph 8, Clause 3 of the United States Constitution (commerce clause)." Dept. App. B at 3a-4a. This sequence of events leads to the suspicion that the Grace decided to take this case "all the way to the U.S. Supreme Court" and was casting about for federal issues.

STATEMENT OF THE CASE

This case is unique. It presents no issue of national concern. Further, the respondent, the Department of Revenue of the State of Montana, ("Department") disagrees the allegations in the petitioner's, W.R. Grace & Co. – Conn, ("Grace"), statement of the case on many critical points.

First, Grace has gone outside the record of this case and created a new record. This manufactured record is incomplete and inaccurate. Grace's statement of the case was created from selected "excerpts" of depositions and affidavits in two different cases: *Norfolk Energy, Inc. v. Department of Revenue,* Montana Twelfth Judicial District, Hill County, Cause No. DV-89-089 and *PacifiCorp. v. Department of Revenue,* Montana First Judicial District, Lewis and Clark County, Cause No. CDV-89-344.[2]

The excerpts from the depositions and affidavits relied upon by Grace do not reflect what actually happened in this case.[3] The deposition of an attorney, David

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[2] The *Norfolk* case was settled with the payment of $4.5 million dollars for taxes, interest and penalty after a District Court, in an original action, independently reached the same legal decision as STAB. *J. Burns Brown Operating Co. v. Department of Revenue,* Cause No. ADV-89-555, Montana First Judicial District, Lewis and Clark County, (Decided September 1, 1989). The *PacifiCorp* case is on remand back to STAB pursuant to a November 21, 1989 order which is reprinted as Department Appendix C at 7a.

[3] This case was mentioned five times in the Deposition of Paul Van Tricht, *Norfolk Energy, Inc. v. Department of Revenue,* Cause No. DV-89-089 (Mont. Twelfth Judicial District, Hill County), July 21, 1989. All five references are found in Department Appendix D at 16a.

Woodgerd, who was not directly involved in this case, does not reflect what happened in this case. Also, Grace took these excerpts out of context.

Grace's assertions that alleged ex parte communications and standard practices of the State Tax Appeal Board of the State of Montana (STAB) were "unbeknownst to Grace," "secret," and "without notice to opposing counsel" are not even supported by depositions and affidavits relied upon by Grace. Those portions of that record were omitted from Grace's Appendix.

For example, an excerpt from the *Norfolk* deposition rebuts Graces's central assertions that STAB's procedure was not known by Grace:

Q. And in Grace, Mr. Van Tricht?

A. No recollection of that at all; although I do know that George Bennett was aware of STAB's procedure because he told me.

Q. He did what?

A. He was aware of STAB's standard operating procedure because he told me he was after the case.

Q. And were you aware of it too?

A. I first became aware of STAB's standard operation after George Bennett told me about it. Since you're good friends, I assumed he would have told you about STAB's standard operating procedure too.

Q. That was in the Grace case; is that right?

A. Yes.

Deposition of Paul Van Tricht, *Norfolk Energy Inc. v. Department of Revenue,* Cause No. DV-89-089 (Mont. Twelfth Judicial District, Hill County), July 21, 1989. (Dept. App. D at 21a).

Mr. George Bennett was Grace's local attorney and has represented Grace throughout these proceedings. He has practiced before STAB since its creation in the early 1970s. As an experienced practitioner before STAB he was aware of STAB's "standard practices."

STAB's general practices and procedures were not a secret. They were the subject of one prior District Court opinion, *Helmmco, Inc. v. Department of Revenue,* Montana First Judicial District, Lewis and Clark County, Cause No. 5082, decided August 13, 1985. Excerpts of that decision are attached as Department Appendix E at 22a. The District Court decision did not find STAB's general decision writing practices unlawful. STAB's practice was often announced during or shortly after the hearing. (Grace App. K at 98a & 100a).

Therefore, this Petition presents several unresolved critical factual conflicts. Grace is asking this Court to make findings of fact to resolve these conflicts.

Second, the record of this case shows that STAB's substantive decision was uniquely its own. Its firm decision was reached before the alleged ex parte contact when STAB dictated the order. (Grace App. I at 88a-89a).

During 3 days of hearings Grace presented seven witness and many hundreds of pages of exhibits. On January 9, 1987, after the hearing and before the decision, Grace submitted a 73 page initial brief which contained

no less than 23 separately numbered requested findings of fact (27 pages). Excerpts from that brief are attached as Department Appendix F at 25a. Some of those requested findings of fact were substantially adopted in the final order. (Grace App. F at 49a & 53a-56a). On January 9, 1987, the Department also submitted its brief. On February 10, 1987, Grace filed a 30 page reply brief which fully responded to all the Department's arguments. Grace had a full and fair opportunity to present its entire case and all its arguments to STAB.

STAB did not adopt the Department's position in total. Indeed, it ruled against the Department on no less than seven separate deductions and three points of law.[4] STAB's rulings for and against both the Department and Grace showed that it carefully considered the evidence, the witnesses and the case in general in reaching its decision.

The members of STAB played active roles as the decision makers. In STAB's decision there was a dissent on one issue on which the majority held for the Department. That board member also dissented on another issue which was decided by the majority in Grace's favor. (Grace App. F at 73a-74a). A complete record in this case would show that the local counsel for Grace was contacted by the dissenter and told that a dissent was being

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[4] STAB allowed Grace almost a half million dollars in deductions which were not allowed by the Department. These deductions included the largest single deduction at issue – hauling and related expenses of $260,000. (Grace App. F, at 51a, 52a, 55a, 57a, 59a, 71a & 72a).

prepared. Grace's local counsel also was offered the opportunity to make suggestions on the dissent.

The Department cross-appealed STAB's decision to the District Court. That cross-appeal is attached as Department's Appendix G at 27a. The Department's arguments before the District Court mirrored those of Grace. The Department also felt that STAB's decision was "inconsistent." The District Court dismissed both Grace's appeal and the Department's cross-appeal. (Grace App. D at 41a).

Third, the record Grace has created does not support its assertion that it did not discover the alleged ex parte communications until after the petition for rehearing was filed with the Montana Supreme Court. In 1988, after the decision of the state district court, Grace retained a second local attorney, Terry B. Cosgrove. (Grace App. B at 19a). Mr. Cosgrove also represented PacifiCorp, and he took part in the deposition of David Woodgerd on June 6, 1989.[5] That portion of the Woodgerd deposition is attached as Department's Appendix H at 31a. Mr. Cosgrove knew of the alleged ex parte communications no later than June 6, 1989. (Grace App. L at 103a). Yet, Grace did not raise this issue under Rule 3 M.R.App.P. before the decision of the Montana Supreme Court on August 18, 1989. It did not raise this issue in its original Petition for Rehearing on August 25, 1989. It waited over three months, until September 12, 1989, to raise the issue.

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[5] Mr. Cosgrove was an attorney (employee) for the Department in 1973 and 1974. He worked for the Department under contract until 1985.

Fourth, Grace was not faced by procedural barriers or an unusually limited scope of review of STAB's decision before Montana courts. The standards in Montana for review of administrative decisions are essentially the same as those applied to administrative decisions by federal and other state courts.[6] When the Montana Supreme Court has found that STAB has committed an error, that Court has not hesitated to overturn STAB's decision.[7]

Grace's complaints about the restrictions on the scope of review are refuted by the actual review that was conducted by the Montana Supreme Court:

> Neither party contest the valuation of the deductions declared by Grace nor whether Grace actually incurred the expenses claimed. Therefore, the question raised by Grace's first issue – whether the deductions are statutorily permissible – *involves only a question of law.*

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[6] See, e.g., *Udall v. Tallman*, 380 U.S. 1 (1965). Review of the Department's administrative decisions which are not made subject to STAB's de novo review are themselves subject to the same standard of judicial review in Montana district courts as STAB decisions.

[7] See, e.g., *Dept. of Revenue v. St. Tax Appeal Bd.*, 613 P.2d 691 (Mont. 1980), *DeVoe v. Dept. of Revenue of Montana*, 759 P.2d 991 (Mont. 1988), *State Dept. of Revenue v. Paxson*, 666 P.2d 768 (Mont. 1983), *Dept. of Revenue v. Countryside Village*, 667 P.2d 936 (Mont. 1983), and *Hi-Line Radio Fellowship v. Dept. of Rev.*, 737 P.2d 886 (Mont. 1987). In each case the Montana Supreme Court reversed a STAB decision in whole or in part. Indeed that court, in one of the cases which Grace cited for its argument that it was "confined" by the standards of judicial review, *Department of Revenue v. Grouse Mountain Development*, 707 P.2d 1113 (Mont. 1985), in fact, reversed STAB's decision.

> Likewise, the second issue presented for review – whether the deficiency assessment is barred by the statute of limitations – *involves solely a question of law.* Thus, we will use the *broader* "abuse of discretion" *standard* in our analysis of both issues. (Emphasis supplied.)

W. R. Grace & Company v. Dept. of Revenue, 779 P.2d 470, 473 (Mont. 1989).[8] (Grace App. B at 24a-25a).

The Montana Supreme Court then independently proceeded to analyze the issues based on the Montana statutes and its past decisions. Procedural error by STAB would not change the Montana Supreme Court's analysis of the substantive legal issues in this case or the final outcome on those issues.

SUMMARY OF ARGUMENT

The Petition should be denied because:

1. The record does not support the issue which Grace has raised in its Petition. Grace has constructed an incomplete and inaccurate record outside of the official record. Grace is asking this Court to become a fact finder.

2. The issue raised in this Petition was not timely raised in or ruled on by the Montana courts.

---

[8] The statute of limitations issue was submitted upon a stipulation of fact as were many of the other issues involved in this case. (Grace App. F at 46a). Throughout its arguments before the Montana Supreme Court Grace emphasized that there was no dispute about the facts.

3. The issue raised in this Petition currently is before the Montana courts in other cases and will be resolved by those Montana courts on independent state grounds.

4. The issue raised in this Petition could not affect the decision of the Montana Supreme Court which turned on that court's legal interpretations of a unique Montana tax.

5. Since federal courts have already addressed this general issue and rejected Grace's argument; no significant federal issue has been raised by the Petition.

REASONS WHY THE PETITION SHOULD BE DENIED

GRACE DID NOT TIMELY RAISE THE ISSUE BEFORE THE STATE COURTS – THE RECORD DOES NOT SUPPORT GRACE'S PETITION

It is essential for jurisdiction under 28 U.S.C. § 1257(a) that "any title, right, privilege of immunity is specially set up or claimed under the Constitution" before the state courts in a timely manner. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Despite the knowledge of the basis for this Petition by its local attorneys, Grace did not raise this question before the District Court or before the Montana Supreme Court in its appeal, or in its original petition for rehearing. Grace raised this issue in an amended petition for rehearing which was filed after the time allowed by the rules of the Montana Supreme Court.

Fundamental policy considerations underlie this jurisdictional requirement of 28 USC § 1257(a). First, federal constitutional issues not raised in the state courts

"are those on which the record is very likely to be inadequate, since it certainly was not complied with those questions in mind." 394 U.S. 437, at 439. This case illustrates that general observation. Here Grace is asking this Court to consider a *constitutional* issue with absolutely no record on that issue. The allegations, which it has manufactured for this Court from bits and pieces of the records of two other cases, are inaccurate and misleading. Since it consists of the record of other proceedings, it does not reflect what actually happened in this case. There are conflicts in this manufactured record that this Court will have to resolve to reach the issue raised in this Petition. For example, this Court will have to determine if the alleged ex parte contacts were truly "without notice to opposing counsel." This Court will become a trial court.

Without an accurate record Grace wants this Court to decide a *constitutional* issue and significantly expand the due process clause of the XIV Amendment of the United States Constitution.

Judicial economy is another reason for this jurisdictional requirement. If a federal question is timely raised in the state courts, the question might "be blocked" by a decision of the state court based on independent state grounds, thereby rendering unnecessary any Supreme Court review of the federal issue. *Ibid.*

This case also illustrates that reason. As shown in Grace's Appendix this issue has been raised in several other cases currently pending in Montana courts. Recently, in the *PacifiCorp* case the District Court remanded the case back to STAB because it considered STAB's procedure in that case, based upon the record in

that case, "unlawful" under Montana law, MCA 2-4-613. (Dept. App. C at 13a-14a). Although the *PacifiCorp* decision appeared to distinguish the facts in that case from facts in *Helmmco*, that decision appeared to conflict with the *Helmmco* decision. (Dept. App. E at 22a). Both cases were decided solely upon Montana law.

Given these decisions its clear that the controversy over STAB's procedures soon will be finally resolved by Montana courts. The final resolution probably will be based solely upon Montana law. Therefore, review by this Court would be redundant, and the effect of a decision in this case will be confined to this case alone.

The substantive heart of this case involves two issues of Montana law which were definitively decided by the Montana Supreme Court. Procedural error would not affect the decision of the Montana Supreme Court on those two issues.

This case is not of sufficient general importance to merit this Court's consideration.

NO SIGNIFICANT DUE PROCESS ISSUE HAS BEEN RAISED BY THE PETITION – FEDERAL COURTS HAVE REJECTED GRACE'S ARGUMENT

Upon a manufactured, inaccurate record Grace wants this Court to expand the due process clause of the XIV Amendment to the United States Constitution. Essentially, Grace wants this Court to issue an advisory opinion, a type of hypothetical declaratory judgment or writ of supervisory control.

The mere fact that the prevailing party reduced a court's decision to writing is not a violation of the *constitution*.

Grace has selectively misconstrued the holdings in several cases. For example, in *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985), this Court held: "Nonetheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." In *Anderson* this Court reversed a decision by the 4th Circuit, *Anderson v. City of Bessemer City, N.C.*, 717 F.2d 149, *rehearing and rehearing en banc denied* (4th Cir. 1983), which had reversed a District Court decision. When the 4th Circuit reversed the District Court decision in *Anderson*, it relied upon the same *Chicopee* dicta which is being relied upon by Grace in its petition. 717 F.2d 149, at 156.

The language quoted by Grace from *Chicopee Manufacturing Corp. v. Kendall Company*, 288 F.2d 719, 724-25 (4th Cir. 1961) *cert. denied*, 368 U.S. 825 (1961), was dicta because the federal district court's decision was reversed and remanded on the merits of the decision. That dicta was not been followed in a recent decision by the 4th Circuit, *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, *rehearing denied* (4th Cir. 1989), which instead applied this Court's decision in *Anderson*. The 4th Circuit realized that this Court effectively *reversed* the dicta in *Chicopee* with its *Anderson* decision.

The *Chicopee* dicta, although quoted, also was not followed in a decision by the 8th Circuit in *Bradley v. Maryland Casualty Company*, 382 F.2d 415 (8th Cir. 1967).

In *Bradley* counsel for the defendants apparently prepared the findings and conclusions and the court's supporting memorandum without notice to opposing counsel. On the issue of whether this practice violated the opposing parties right to due process, the 8th Circuit concluded: "We see no deprival of any constitutional right or anything which warrants reversal for this alone." 382 F.2d 415, at 423.

The most recent case cited by Grace, *In re Colony Square Co.*, 819 F.2d 272 (11th Cir., 1987), *cert. denied*, 108 S. Ct. 1271 (1988), holds exactly contrary to Grace's arguments. Colony Square was in Chapter 11 bankruptcy. At issue was the ownership and control of assets called Colony Square Complex. Prudential Insurance moved to compel compliance with the reorganization plan. After hearing the case, the judge telephoned Prudential's lawyers and informed them that he intended to rule in Prudential's favor. He asked for draft orders. Colony Square's lawyers were not informed. While stating its disapproval, the 11th Circuit held "[t]he fact that a judge allowed a litigant to draft the court's orders does not automatically invalidate these orders, however." 819 F.2d 272, at 276.[9]

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[9] In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964), Justice Douglas stated:

> There was a trial, and after oral argument the judge announced from the bench that judgment would be for appellees and that he would not write an opinion. He told counsel for appellees 'Prepare the findings and conclusions and judgment.' They obeyed, submitting 130 findings of fact, and one conclusion

(Continued on following page)

In *Colony Square* the Circuit Court further found there was no denial of due process because the judge had already made his decision when he called Prudential's attorneys and because Colony had ample opportunity to present its arguments. "Having reviewed the record in this case we conclude that Colony *was not denied due process." Ibid.* (Emphasis supplied.)

Grace has failed to timely raise a *substantial federal* question.

(Continued from previous page)

> of law, all of which, we are advised, the District Court adopted verbatim. Those finding, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence (cite omitted).

If Justice Douglas felt that practice violated a parties right to due process, he certainly would have said so. This decision was rendered after *Chicopee*. Also see *United States v. Marine Bancorporation*, 418 U.S. 602, 615, n.13 (1974).

CONCLUSION

For the reasons presented above, the Petition for Certiorari should be denied.

DATED this 23rd day of January, 1990.

Respectfully submitted,

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APPENDIX

APPENDIX A

Rule 34. Petitions for rehearing

When, in appeals or special proceedings, it is ordered that remittitur, peremptory writ or judgment issue forthwith, no petition for rehearing will be entertained. In all other cases a petition for rehearing may be filed within 10 days after the decision of the supreme court has been rendered, unless the time is shortened or enlarged by order, and the adverse party shall have 7 days thereafter in which to serve and file his objections thereto. Extensions of time will be granted only upon showing of unusual merit, and in no event in excess of 10 days. A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed. Oral argument in support of the petition will not be permitted. Six copies of the petition and six copies of objections thereto, which may be in typewritten form, shall be filed with the clerk.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 88-266

W. R. GRACE & CO., a Corporation,

Petitioner/Appellant,

-vs-

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,

Defendants/Respondents.

APPELLANT'S PETITION FOR REHEARING

COMES NOW the Appellant, W. R. Grace & Co., and for its petition to this Court pursuant to Rule 34 of the Montana Rules of Appellate Procedure, respectfully requests the Court to reconsider its decision for following reasons:

I

a. Petitioner requests that the Court reconsider its decision as to the statute of limitations issue and find and determine that under the law the Respondent, Montana Department of Revenue, has no jurisdiction or authority to assess or collect the net proceeds of mines tax deficiencies asserted for the taxable years 1977 and 1978.

b. The grounds for this request are the facts and questions decisive there, submitted by counsel, were

overlooked by the court, viz., the Court in its opinion rendered August 18, 1989 overlooked and failed to deal with the extensive and decisive legislative history behind Chapter 194, Laws of 1983, which resulted in § 15-23-116, RCM [sic]. That legislative history was submitted to the State Tax Appeal Board by "Agreed Statement and Stipulation Covering Statute of Limitations Issue" dated November 26, 1986, and appearing as Tab B in Appellant's Appendix's Appellant's Brief filed with this Court.

c. This Court will find on examination of such legislative history that the Montana Legislature in 1983 expressly dealt with the contentions of the taxpayer and the Department of Revenue as to whether or not there was a two year or ten year limitation.

d. The Court will find from an examination of this legislative record that Chapter 194 was enacted as a result of the presentation by the parties of their contentions as to the two year or ten year statute of limitations, as one uniform and comprehensive statute (15-23-116) that limited DOR in all cases and as to both assessment and collection of deficiencies with respect to net proceeds.

e. The Court will find from an examination of this legislative history that the issue involved is not a question of repeal by implication. The legislature expressly by the language of § 15-23-116, RCM [sic], mandated that there be but one statute controlling and that DOR had no further or other authority under any other statute, whether it is the two year or the ten year statute referred to.

f. Petitioner would again respectfully call the attention of the Court to this legislative history, and particularly to the report of the Senate Taxation Committee of February 9, 1983.

II

a. The Court in its opinion in this matter, by creating requirement that costs or expenses to be deductible for net proceeds tax purposes must be "direct", has judicially created a test which does not appear in the controlling statutes and therefore has denied due process of law to the taxpayer (Amendment XI to the United States Constitution and Article II, Section 17 of the Constitution of the State of Montana), and violated taxpayer's constitutional rights under Article I, Paragraph 8, Clause 3 of the United States Constitution (commerce clause).

b. Nowhere in the controlling statutes is there a requirement that the costs or expenses be "direct."

c. Thus the Court is denying taxpayer due process of law and violating the commerce clause by creating a new and additional test not imposed by the legislature.

III

a. The Court by its opinion (page 12) distinguishes the *Caterpillar* case (633 P.2d 618, 38 State Reporter 1245, Montana 1981) on the grounds that the tax there involved was "selfassessing;" and that the net proceeds tax is "centrally assessed."

b. In fact the Department of Revenue continually argued (Respondents' Brief, p. 56), and STAB specifically

found (Findings, pp. 22-23) that the net proceeds tax is "self-assessing."

c. Therefore the test for both the corporation license tax and the net proceeds tax should be the same since they are both identical types of taxes according to the findings in this matter.

d. Thus the Court, by applying a different test as to this taxpayer, has denied taxpayer equal protection of the law (Amendment XIV to the United States Constitution and Article I Section 17 of the Constitution of the State of Montana), and violated taxpayer's constitutional rights under Article I, Paragraph 8, Clause 3 of the United States Constitution (commerce clause).

WHEREFORE your Appellant respectfully requests the Court to:

(1) Grant limited rehearing and upon rehearing to determine as a matter of law that the Department of Revenue's asserted deficiencies for 1977 and 1978 are barred by § 15-23-116, RCM [sic].

(2) Grant limited rehearing and upon rehearing to determine as a matter of law that the Department of Revenue's asserted deficiencies for 1977, 1978 and 1979 are erroneous because there is no legal requirement that the disputed costs and expenses be "direct."

DATED this 25th of August, 1989.

PAUL H. FRANKEL
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ATTORNEYS FOR
APPELLANT

CERTIFICATE OF SERVICE BY MAIL

I certify that on this 25th day of August, 1989, a true and correct copy of the foregoing APPELLANT'S PETITION FOR PARTIAL REHEARING has been served by placing the same in the United States mail, postage prepaid, and addressed as follows:

PAUL VAN TRICHT
Tax Counsel
Department of Revenue
Mitchell Building
Helena, MT 59620

/s/ George T. Bennett
GEORGE T. BENNETT

APPENDIX C

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PACIFICORP, an Oregon corporation, Petitioner, vs- THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and STATE TAX APPEAL BOARD OF THE STATE OF MONTANA, Respondents.	)	Cause No. CDV-89-344 *MEMORANDUM AND ORDER*

* * *

BACKGROUND

On May 18, 1989, Plaintiff PacifiCorp filed a petition for judicial review of the entire decision rendered by the State Tax Appeal Board (STAB) in Docket No. CT-1985-2. PacifiCorp requests this Court to review STAB's decision to uphold the Department of Revenue assessment against PacifiCorp of additional taxes due, plus interest, for 1974 through 1979, and the Department's denial of a refund for PacifiCorp for the years 1971 through 1979.[1] STAB issued

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[1] The refund requested by PacifiCorp was for $2,369,078 plus interest. The additional tax assessed due to the audit was approximately $1,116,795, after allowing for a refund of taxes paid by PacifiCorp affiliates other than Western Minerals and Resource Development.

(Continued on following page)

its order on February 28, 1989, after hearing the matter on May 16 through May 20, 1988.

Both the Department of Revenue (hereinafter Department) and PacifiCorp have filed cross-motions for partial summary judgment on one of the issues raised by PacifiCorp's petition for judicial review. The Department filed its motion on May 18, 1989, with an accompanying brief. PacifiCorp filed its motion and accompanying brief on July 7, 1989. Both parties filed reply briefs and oral arguments were heard on August 30, 1989. The matter is now deemed submitted for decision.

FACTS

On February 9, 1989, Dale Dean, Chairman of STAB, contacted David Woodgerd, the Department's Chief Legal Counsel. Woodgerd Aff., pp. 2-3. Dean informed Woodgerd that STAB had decided the case of Department of Revenue v. PacifiCorp, Inc. in favor of the Department, and requested the Department to prepare a draft decision document for review by the Board. Dean dictated the basis of the Board's decision to Woodgerd and Woodgerd drafted the findings of fact, conclusions of law, discussion and order and submitted the draft document to STAB on about February 22, 1989. Woodgerd Aff,, pp. 2-3. STAB

(Continued from previous page)

Therefore the difference between a full refund and payment of the tax is almost $3.5 million. Interest continues to accrue on both the refund request and the assessment. The total difference including interest is now more than double this amount.

requested and received a copy of the draft document on a computer disc for ease in editing. Woodgerd Aff., p. 3. STAB issued findings of fact, conclusions of law, discussion and order in this case on February 28, 1989. STAB used the Department's draft verbatim, except for the omission of "§" and "¶" signs and two typographical errors. Vashro Aff., pp. 1-3.

Neither STAB nor the Department gave PacifiCorp notice of these contacts, a copy of the draft, an opportunity to respond to the Department's draft or an opportunity to submit a similar draft of its own. Woodgerd Depo, pp. 44, 81.

At the administrative hearing, counsel for PacifiCorp specifically asked STAB in the Department's presence whether STAB would be willing to receive proposed findings and conclusions from the parties. STAB stated that it would not. Neither STAB nor the Department stated that STAB would or might request the prevailing party to prepare a draft decision in this case. Cosgrove Aff., p. 2; Ormseth Aff., pp. 1-2; Woodgerd Depo., p. 85.

Since 1985, when *Helmmco, Inc. v. Department of Revenue*, No. 50827, 1st Jud. Dist. (Mont. 1985) was decided, the Department has, at STAB's request, followed the practice of dropping draft decisions off at STAB, rather than mailing the drafts with a transmittal cover letter. Woodgerd's understanding of the reason for this practice is that it is better not to have a transmittal letter so that opposing counsel would not be aware when the Department prepared the findings as it did in the *Helmmco* case. Woodgerd depo., p. 29.

By chance, on February 22, 1989, Woodgerd met and spoke with John Shepherd, Pacificorp's principal representative in the litigation. Shepherd Aff., p. 2. Shepherd inquired of Woodgerd when he thought the decision would be handed down and how STAB might inform the parties of its decision. Woodgerd gave no indication that he had already been contacted by STAB and had in fact already prepared a draft decision. Instead, Woodgerd simply replied that STAB would sometimes proceed by contacting the prevailing party and asking that party to submit a proposed decision. Shepherd Aff., p. 2. PacifiCorp contends that when Woodgerd and Shepherd spoke, Woodgerd deliberately kept secret the fact that the Board had contacted him, informed him of its decision in favor of the Department, and requested him to prepare a draft decision for the Board, which he had already completed. It is not clear from the facts presented how or when PacifiCorp learned that the Department and not STAB had drafted the decision in this case.

DISCUSSION

Both the Department and PacifiCorp seek summary judgment on the question of whether, as a matter of law, unlawful procedure occurred at the administrative level when STAB rendered its decision in favor of the Department and against PacifiCorp. PacifiCorp also alleges prejudicial ex parte communication occurred between STAB and the Department, such as to violate PacifiCorp's constitutional due process and statutory rights.

1. Did STAB err in adopting verbatim the findings of fact and conclusions of law prepared by the Department?

In this case STAB adopted verbatim the findings of fact and conclusions of law prepared by the Department. Although the Montana Court has stated that it disapproves of this practice, it is not sufficient to constitute reversible error provided the findings and conclusions are supported by the evidence presented. *Sun Dial Land Co. v. Gold Creek Ranches*, 198 Mont. 247, 645 P.2d 936 at 940 (1982); *Tomaskie v. Tomaskie*, ___ Mont. ___, 625 P.2d 536, 38 St. Rep. 416 (1981).

2. *Was the contract between STAB and the Department an ex parte consultation prohibited under MCA 2-4-613?*

The Department's motion for partial summary judgment requests this Court to rule that "there was no unlawful procedure [by STAB] at the administrative level as alleged on pages 6 and 7 of PacifiCorp's Petition for Judicial Review." The Department relies heavily on Judge Loble's decision in *Helmmco, Inc. v. Dept. of Revenue, supra,* for support of STAB's practice of contacting the prevailing party without notice to the opposing party. There are, however, significant differences between *Helmmco* and this case.

In *Helmmco,* the court upheld STAB's decision on the merits after reviewing the entire record. Despite the parties' failure to object to STAB's announcement that it might contact the prevailing party to draft a decision, the court registered its disapproval of the practice employed by STAB in adopting the prevailing party's draft decision. *Helmmco, Inc. v. Department of Revenue,* No. 50827, 1st Jud. Dist., p. 13 (Mont. 1985).

In this case, STAB solicited, obtained and adopted verbatim a draft decision, including findings of fact and

conclusions of law, from one party without notice to the opposing party. The Board did this despite previously telling both parties that it would not accept any proposed findings of fact and conclusions of law from the parties.

In support of its position that no unlawful ex parte contact occurred, the Department cites an Oregon case where that court held that an attorney had not engaged in illegal ex parte contact. *In re Bernard K. Smith*, 295 Or. 755, 670 P.2d 1018 (1983). In *Smith*, the Oregon court looked at whether the content of the ex parte communication was on "the merits of the cause." *Id.*, 670 P.2D 1020. The court defined the merits of a proceeding as having to do with the legal rights or duties of the parties. *Id.* In that case the court held that since the ex parte contact did not affect any legal right or duty of the parties, it was therefore not on the merits of the cause, and hence not impermissible ex parte contact. *Id.*

In this case, the Department implies that since STAB had already reached its decision and merely requested the Department to draft a decision in accordance with that decision, the ex parte contact had no effect on the case. The Department argues that the contact between STAB and the Department was not prohibited as it did not go to the merits of the decision. However, such a position does not acknowledge the importance of the findings of fact and conclusions of law in a proceeding for judicial review.

PacifiCorp points out that on appeal it is bound by the findings of fact and conclusions of law contained in STAB's order. While the Department was able to draft these findings and conclusions to its own advantage,

PacifiCorp had neither notice nor opportunity to propose or argue its own findings or conclusions.

The Department also cites this Court to a recent Montana Supreme Court decision where the Court denied both the petition for rehearing on the merits and the amended petition for rehearing alleging unlawful procedure very similar to the case here. *W.R. Grace v. DOR*, No . 88-266 , decided September 14, 1989, not yet published. When the petition for rehearing was filed in *Grace*, the time period allowed under Rule 34, M.R.App.P. had already expired. In denying the petition, the Court gave no indication as to whether it was denied on substantive grounds or procedural grounds. Therefore the *Grace* decision provides no guidance to this Court for the case at hand.

In addition, the Department justifies the practice of having the prevailing party draft decisions on the basis of the volume of the decisions heard by STAB. However, the volume of decisions issued by STAB does not preclude giving both parties notice and opportunity to submit a proposed order, findings of fact and conclusions of law.

Having fully considered this matter, the Court concludes that in order to protect the integrity of the administrative decision-making process, there must be notice and opportunity for opposing parties to respond to communications when there is "any connection with any issue of fact or law." MCA 2-4-613 (1989).

3. *What is the proper remedy for unlawful procedure?*

Since PacifiCorp contests the lack of opportunity to participate by submitting its own proposed findings of

fact and conclusions of order, the proper remedy is to give PacifiCorp an opportunity to submit its own proposed findings and conclusions. Even though STAB used unlawful procedure, that does not necessarily warrant setting aside the entire decision. It would be premature for this Court to review the merits of STAB's decision until both parties have had an equal opportunity to submit proposed findings and conclusions. Remanding this case to STAB with instructions to allow both parties an opportunity to submit their findings and conclusions will provide adequate relief to PacifiCorp. Moreover, if this Court were to review the merits without regard to the unlawful procedure employed by STAB, then STAB would be free to continue the unlawful procedure which formed the basis of this dispute.

CONCLUSION

Based on the foregoing, the Court concludes that STAB's order dated February 28, 1989 is invalid due to unlawful procedure and should be vacated. The Court further concludes that this case should be remanded to STAB with instructions to accept and consider proposed findings of fact and conclusions of law from both parties in this matter before issuing a final order. The parties should also be given an opportunity to submit additional argument in support of their positions.

ORDER

NOW, THEREFORE, IT IS ORDERED that STAB's order dated February 28, 1989, is hereby set aside and vacated.

IT IS FURTHER ORDERED that this matter be, and hereby is, remanded to STAB which shall accept and consider proposed findings of fact and conclusions of law and memoranda of points and authorities from both parties before issuing its final order.

DATED this 21st day of November, 1989.

/s/ Thomas Honzel
DISTRICT COURT JUDGE

pc: Terry B. Cosgrove
Milo E. Ormseth
Charles A. Smith
David W. Woodgerd

APPENDIX D

MONTANA TWELFTH JUDICIAL DISTRICT
HILL COUNTY

NORFOLK ENERGY INC., Petitioner, -vs- DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Respondents and BLAINE, CHOUTEAU and HILL COUNTIES, Intervenors.	)	Cause No. DV-89-089

DEPOSITION OF PAUL VANTRICHT

BE IT REMEMBERED, that the deposition upon oral examination of PAUL VANTRICHT, appearing at the instance of Petitioner, was heard at the Offices of the Department of Revenue, State of Montana, Mitchell Building, Helena, Montana, on the 21st day of July, 1989, beginning at the hour of 9:30 a.m., before Sherron Walstad, Court Reporter, Notary Public.

* * *

CRARY & HENDRICKSON REPORTING
17 West Sixth Avenue, Power Block West
P.O. Box 1222
Helena, Montana 59624
(406) 443-0080

P. 27 (lines 14 – 24)

Q. (By Mr. Sites] What's your best recollection at this point?

A. My best recollection is that I recall them referring to at least one case.

Q. What case was that?

A. The *W. R. Grace versus the Department of Revenue* case.

Q. Do you recall their referring to any other cases?

A. I don't recall them referring to any other cases. That does not mean that they didn't refer to them. That means I can't recall at this time.

P. 31 (lines 15) through P. 32 (line 9)

Q. The decision document also contains a discussion, including a number of case law citations.

A. Yes.

Q. Were these cases discussed at the meeting? You indicated one case was, the Grace case, I believe?

A. Yes. I don't have the document you're looking at in front of me.

Q. (Mr. Sites hands document to Mr. VanTricht.) Was a case of Hoover and Bracken Energies discussed.

A. Hoover and Bracken Energies? I don't recall.

Q. Was the case of Exxon Corporation versus Eagerton discussed?

A. I don't recall.

Q. So really the only case that you recall being discussed is the Grace case; is that correct?

A. That's the only case that I can recall at this time being discussed. However, that does not mean that other cases were not discussed. Again, this wasn't a discussion. It was three parties giving me the reasons for their decision.

P. 35 (line 2) through P.36 (line 20)

Q. Do you know why they contacted you to write a draft decision for them in this case?

A. No, other than the fact that it is one of their standard procedures.

Q. Certainly every case that you are involved in with the board you don't draft a decision?

A. No. I sometimes lose.

Q. How many decisions have you drafted for the board?

A. We're talking about decisions which they dictated to me. Oh, golly. I can recall at this time, and there may be more; let's see, three or four that I can recall. There may more.

Q. Do you recall the names of those cases?

A. Hold it. I've got to go back, I don't know what you mean by decisions. There may have been more, you know. Well, let's go back. Could you repeat the question?

Q. How many times has the board requested of you to prepare draft proposed findings of fact and conclusions of law?

A. Again, it's maybe four times. They've asked me to prepare orders of other natures.

Q. Right, but a draft decision document similar to what was prepared in Tricentrol.

A. Right. You're talking about similar?

Q. Yes.

A. I think four or five.

Q. Was one of them a case called Somont, S-o-m-o-n-t?

A. Yeah, I believe so, yes.

Q. Vanderpas, V-a-n-d-e-r-p-a-s-s –

A. I believe so, yes.

Q. And Grace?

A. Probably, I think so,

Q. And Mountain State Resources?

A. I don't recall Mountain State Resources. I don't recall that case, but then again, if it took place over a couple years ago, I could or couldn't. I'm not quite sure.

Q. Did the board indicate at the meeting, or at any time, why it was asking you to prepare the draft decision document?

A. You mean in so many words?

Q. Yeah. Did they indicate why they were approaching you in the TriCentrol case?

A. Directly, no. I mean, this is their standard procedure.

P. 61 (line 25) through P. 63 (line 9)

Q. When you say your recollection of the events, you're referring to the events in the Pacific Corp. proceeding?

A. I have almost no – I was not counsel on Pacific Corp. In fact, I was only vaguely aware that there was such a thing as Pacific Corp. until recently.

Q. You were tax counsel in Somont?

A. Yes. A Somont case, I'm not sure if there might have been more than one.

Q. This is a case where you had drafted the decision document for the Tax Appeal Board; that Somont case.

A. Yes, I was tax counsel on that Somont case.

Q. Did the board at the conclusion of the hearing, or otherwise, indicate that the prevailing party might be requested to draft the decision document?

A. I can't recall one way or the other. That case was four or five years ago, so I have almost no recollection at all.

Q. How about in Vanderpas; what, if any, indication –

A. Again, I have no – nothing at all in my – I couldn't state one way or the other.

Q. And in Grace, Mr. VanTricht?

A. No recollection of that at all; although I do know that George Bennett was aware of STAB's procedure because he told me.

Q. He did what?

A. He was aware of STAB's standard operating procedure because he told me he was after the case.

Q. And were you aware of it too?

A. I first became aware of STAB's standard operation after George Bennett told me about it. Since you're good friends, I assumed that he would have told you about STAB's standard operating procedure too.

Q. That was in the Grace case; is that right?

A. Yes

APPENDIX E

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

* * *

HELMMCO, INC., a Delaware corporation, Petitioner, -vs- DEPARTMENT OF REVENUE and the STATE TAX APPEAL BOARD of the State of Montana, Respondents	No. 50827 ORDER CONCERNING PETITION FOR JUDICIAL REVIEW

SUMMARY OF ISSUES AND DECISION

P. 12 (line 18) through P. 14 (line 12)

MOTION TO ADMIT EVIDENCE OF OFF RECORD PROCEDURAL IRREGULARITIES

As concerns this motion, it appears that STAB may have taken the position, at the time of hearing below, that neither the Department of Revenue nor taxpayer Helmmco should present proposed findings of fact and conclusions of law. Thereafter, it appears that when STAB had made a determination as to what it wished to do, it asked the attorneys for the Department of Revenue to prepare its decision. The Department attorneys did this, and STAB adopted that proposed decision. As noted above, the decision did not adopt the original proposal of the

Department for a two factor formula, but, rather, adopted a position somewhat midway between the positions of the Department and the taxpayer. Helmmco asserts that it should have had the right to argue exceptions to the proposed decision submitted, upon request, to STAB by DOR.

If the Court granted the motion, and proof was made, it would according to Helmmco, show the facts to be as previously set forth by this Court. Our Supreme Court has indicated that, in the case of district court appeals to it, the Court does not approve of district judges adopting, verbatim, the findings of any party. However, as our Supreme Court has also remarked, the question is whether the findings of fact and conclusions of law are "clearly erroneous" upon the record. *Speer v. Speer*, ___ Mont. ___, 654 P.2d 1001, 39 St. Rep. 2204 (1982); *Glasser v. Glasser*, ___Mont. ___, 669 P.2d 685, 40 St. Rep. 2204 (1983). In this case, there is no doubt that the findings which STAB did adopt are supported by the record, and that the conclusions of law made by STAB did not constitute an abuse of discretion nor do they offend against the legislative intent in adopting UDITPA.

I do not approve of the procedure used by STAB nor of the wholesale adoption of the proposed findings and conclusions of any party. Nevertheless, When those findings and conclusions are supported by the record, they must be upheld by this Court. Helmmco's motion to admit evidence of off record procedural irregularities is denied.

JUDGMENT

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Petitioner, Helmmco, shall take nothing by its petition for judicial review, and the same is denied and dismissed.

DATED this 13th day of August, 1985.

/s/ Henry Loble
DISTRICT JUDGE

cc: Counsel of Record

APPENDIX F

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

W. R. GRACE & CO., a corporation	)	
Petitioner	)	No. MT-1989-9
vs	)	
DEPARTMENT OF REVENUE OF THE STATE OF MONTANA	)	

BRIEF FOR PETITIONER

PAUL H. FRANKEL
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GEORGE T. BENNETT
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ATTORNEYS FOR W.R. GRACE & CO.

[P. 1]

CONTENTS

Page

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 3

PETITIONER'S REQUEST FOR FINDINGS OF FACT 4

ARGUMENT

I. The statute of limitations bars an assessment for 1977 and 1978 31

II. The disputed deductions disallowed by the Department of Revenue ("DOR") for 1977, 1978 and 1979 are all allowable under § 15-23-503 because the moneys involved were expended for (i) necessary labor, machinery and supplies needed and used in the vermiculite mining operations and developments of W.R. Grace & Co. ("Grace") at Libby; (ii) costs of repairs and replacements of the milling and reduction works used in connection with the mine; (iii) transportation of the vermiculite from the mine to the mill, the reduction works and the place of sale; (iv) marketing the vermiculite; and (v) converting the vermiculite into money 47

CONCLUSION 73

APPENDIX G

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

W. R. GRACE & COMPANY, a corporation,	)	
Petitioner,	)	Cause No. ADV 87-610
-vs-	)	RESPONSE OF THE
DEPARTMENT OF REVENUE OF STATE OF MONTANA; and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA	)	DEPARTMENT OF REVENUE OF STATE OF MONTANA AND CROSS PETITION
Respondents	)	

* * *

COMES NOW the Department of Revenue of the State of Montana ("Department") and responds to the Petition of W.R. Grace & Company ("Grace"):

I

The Department admits the allegations contained in paragraphs 1, 3, 5, 6, 7, and 8 of the petition. The Department admits the allegations contained in paragraph 4 except it denies the allegation that Grace's headquarters in Cambridge, Massachusetts are "supporting facilities".

II

The Department denies the allegations contained in paragraphs 9, 11 and 12 of the petition.

III

The Department responds to the allegations contained in paragraph 10 by stating the "disallowed" deductions are fully set forth in the April 21, 1987 Order of the State Tax Appeal Board. (Grace's Exhibit A).

IV

The allegations in paragraphs 2, 13 and 14 do not require a response.

V

The petition does not state grounds upon which this Court can grant Grace any relief.

VI

The Department denies any allegation not admitted hereinabove and denies any allegation which Grace alleges as the basis for granting any relief.

CROSS PETITION

VII

The State Tax Appeal Board erred in allowing the deduction of the following "expenses":

(a) The watchman expenses;

(b) The reimbursed hauling and related costs during period river crossing conveyor was inoperative;

(c) The safety portion of "Safety, Labor Relations";

(d) The salaries and benefits for the Manager, Assistant Manager, and Chief Geologist; and

(e) The legal fee of filing water rights claims, and the consulting fee for obtaining patents on mining claims.

DEMAND

The Department requests the Court to:

1. Dismiss Grace's petition;

2. Modify the order of the State Tax Appeal Board by not allowing the deduction of the expenses which are set forth in paragraph VII hereinabove; and

3. Grant such other and further relief as this Court deems just and proper.

DATED this 2nd day of July, 1987.

MONTANA DEPARTMENT OF
REVENUE
Office of Legal Affairs
Mitchell Building
Helena, MT 59620-2702

/s/ Paul Van Tricht
PAUL VAN TRICHT
Tax Counsel

CERTIFICATE OF SERVICE

I certify that on this 2nd day of July, 1987, a true and correct copy of the foregoing has been served by placing same in the United States mail, postage prepaid, and addressed as follows:

George T. Bennett
111 North Last Chance Gulch
P.O. Box 1705
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Paul J. Frankel
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/s/ Paul Van Tricht

APPENDIX H

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

PACIFICORP, an Oregon corporation, Petitioner, v. THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, and STATE TAX APPEAL BOARD OF THE STATE OF MONTANA, Respondents.	)	No. CDV-89-344

DEPOSITION UPON ORAL EXAMINATION
OF DAVID WOODGERD

BE IT REMEMBERED, that the deposition upon oral examination of DAVID WOODGERD, appearing at the instance of Petitioner, was heard at the law offices of Luxan & Murfitt, Montana Club Building, Helena, Montana, on the 6th day of June, 1989, beginning at the hour of 11:00 a.m., pursuant to the Montana Rules of Civil Procedure, before Laurie Crutcher, Court Reporter, Notary Public.

APPEARANCES:

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ALSO PRESENT: John Shepard

Supreme Court, U.S.
FILED
FEB 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

W.R. GRACE & CO. – CONN.,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
Introduction	1
Argument	2
I. This Court Has Jurisdiction To Hear This Case	2
II. The Essential Facts Underlying Petitioner's Claim Are Undisputed	3
III. The Montana Supreme Court's Decision In This Case Settled Montana Law With Respect to STAB's Standard Practice	6
IV. The Department's Secret *Ex Parte* Communication Affected The Outcome Of This Case	7
V. STAB's Standard Practice Raises A Substantial Due Process Question	8
Conclusion	10

TABLE OF AUTHORITIES

	Page
Cases	
Aiken County v. BSP Div. of Envirotech Corp., 866 F.2d 661 (4th Cir. 1989)	9
Anderson v. City of Bessemer City, 470 U.S. 564 (1985)	8
Bradley v. Maryland Casualty Co., 382 F.2d 415 (8th Cir. 1967)	9-10
In re Colony Square Co., 819 F.2d 272 (11th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988)	9, 10
United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964)	8
In re Wisconsin Steel Co., 48 Bankr. 753 (N.D. Ill. 1985)	6

No. 89-901

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DEPARTMENT OF REVENUE OF THE STATE OF MONTANA and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF OF PETITIONER

INTRODUCTION

In its petition, Grace contends that the Montana State Tax Appeal Board's ("STAB's") standard practice of relying on secret *ex parte* submissions of the Montana Department of Revenue (the "Department"), without providing opposing counsel with notice or an opportunity to respond, raises substantial due process issues that warrant review by this Court.

Far from presenting a "unique" question, as respondents gratuitously suggest (Resp. Br. at 2),[1] this case presents a question

[1] Brief in Opposition to Petition for Certiorari will be herein referenced as "Resp. Br.," the Petition for Certiorari will be herein referenced as "Pet. Br."

(Footnote continued)

of profound national significance. In addition to its direct effect on the thousands of taxpayers subject to taxation in Montana, many of which conduct their affairs on a national basis, this case seriously implicates the proper conduct of every adversary proceeding in the United States. If secret *ex parte* communications between a litigant and a tribunal are acceptable in an adjudication before a Montana state tax court, then they are acceptable in courts and administrative tribunals throughout the land. Indeed, the national importance of this case is underscored by the filing of a brief *amicus curiae* by the Committee on State Taxation of the Council of State Chambers of Commerce, which represents 43 state chambers of commerce across the nation.

In its opposition to Grace's petition, the Department follows the same tack it used in Montana to defend STAB's standard practice: take whatever steps and whatever positions are necessary to elude scrutiny. To this end, the Department does not seriously attempt to address the merits of Grace's claim. Instead, it raises a smoke screen of arguments intended to obscure STAB's pernicious practice of performing its judicial duties with the assistance of secret *ex parte* communications.

As is demonstrated below, none of Respondent's objections should dissuade this Court from considering the substantial federal question that Grace has properly raised.

ARGUMENT

I. *This Court Has Jurisdiction To Hear This Case.*

The Department has taken the position that this Court does not have jurisdiction to hear this petition. Resp. Br. at 1, 8, 9-10. The Department contends that the Montana Supreme Court did not rule on the constitutional issue raised in this petition because it was allegedly not raised in a timely manner. Resp. Br. at 8.

There is no substance to the Department's argument. The Montana Supreme Court did rule on the constitutional issue raised in this petition. Grace's petition for rehearing was timely filed. The Department is in full agreement with this fact. Resp. Br.

References to Appendix to the Petition will be referenced herein as "Pet. App.", references to the Appendix to the Brief in Opposition will be herein referenced as "Resp. App."

at 1. Grace's amended petition for rehearing, filed while its petition for rehearing was pending with the court, supplemented and related directly to its timely filed petition for rehearing. As a result, the amended petition was, under Montana law, itself timely filed.

Indeed, the Department has affirmatively expressed its belief that Grace's amended petition for rehearing was timely filed. In *PacifiCorp v. Department of Revenue*, Cause No. CDV-89-344 (Montana First Judicial District, Lewis and Clark County) the Department cited the Montana Supreme Court's denial of Grace's amended petition for rehearing as substantive support for its position in that case that STAB's standard practice was lawful. Resp. App. C at 13a. Hence, the Department believes that Grace's amended petition was denied on the merits – not on the ground that it was untimely filed – otherwise the Department could not have cited the case for the proposition that STAB's standard practice was lawful.[2]

II. *The Essential Facts Underlying Petitioner's Claim Are Undisputed.*

The Department alleges that the facts upon which Grace bases its case are incomplete and inaccurate. Resp. Br. at 2-3, 8. The Department then claims that this Court will be forced to become a fact finder in this case. Resp. Br. at 8. Contrary to the Department's statements, no factual dispute surrounds the essential facts upon which Grace's case is founded.

The Department does not dispute – and there can be no dispute over – the improper nature of STAB's "standard practice." STAB's standard practice is discussed at length in Grace's petition. The petition states:

> Paul Van Tricht, Tax Counsel for the Department of Revenue and counsel for the Department in this case, testified in a deposition that he had been requested by STAB to prepare opinions in contested cases (App. I at 88a-90a),

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[2] The Montana district court in *PacifiCorp* expressed some uncertainty as to whether the Montana Supreme Court's denial of Grace's amended petition for rehearing was a decision on the merits. The Montana court's uncertainty was attributable entirely to its mistaken belief that Grace's petition for rehearing – not the amended petition for rehearing – was not timely filed. Resp. App. C at 13a. Since the petition for rehearing was filed in a timely manner, the Montana District Court's uncertainty was unwarranted.

> including the instant case (App. I at 89a-90a); that this was STAB's "standard procedure" (App. I at 90a) and "standard practice" (Id.); and that he did not inform opposing counsel of the requests (App. I at 88a) or send copies of the opinions he drafted to opposing counsel (App. I at 91a).

Pet. Br. at 13 (footnote omitted).

The petition later states:

> STAB, *without notice to opposing counsel*, contacted the Department and requested it to draft the opinion in a contested case. The Department, *without notice to opposing counsel* and in accordance with STAB's "wish" (App. L at 113a) that opposing counsel not be notified, secretly complied with STAB's request. And STAB, *without notice to opposing counsel*, adopted the Department-drafted opinion.

Id. at 16 (emphasis in original).

The Department's only response to this discussion of STAB's standard practice is to claim that the practice was not a secret. Although the secret nature of the standard practice made it that much more offensive, whether the *ex parte* communications between STAB and the Department were, in fact, secret is an issue that this Court need not address. The problems which may result from the standard practice – STAB's abdication of its adjudicative role, overreaching and exaggeration by the Department, and STAB's loss of independence from the Department – are not related to the fact that the practice was secret.

Indeed, this Court need not reach any of the issues that form the basis of the Department's claim that the factual information included in the petition is incomplete and inaccurate. None of the issues that the Department seeks to quibble about is essential to Grace's due process claim. Grace's petition rests on the uncontested facts that (1) *ex parte* communications took place between STAB and the Department in the course of an adversary proceeding and (2) Grace was denied an opportunity to participate in or respond to these communications.

In the interest of completeness, however, Grace will nevertheless address the two factual issues that the Department believes this Court must resolve.

1. The Department first claims that Grace or its attorneys knew of STAB's standard practice at the time of its November 1986 STAB hearing. Resp. Br. at 3-4. Contrary to the recollections and suggestions of Mr. Van Tricht, neither Grace nor its attorneys were aware of the standard practice until shortly before the filing of Grace's amended petition for rehearing. Grace's attorney George T. Bennett, even after being contacted by Mary Hempleman, the dissenting STAB member mentioned in the Department's brief at pages 5-6, was not aware of the standard practice as it is set out in Petitioner's brief.

Grace's attorney Terry B. Cosgrove similarly was not aware that the standard practice was used in Grace's case even though he did attend the PacifiCorp deposition cited in the Department's brief. Mr. Cosgrove did not make the connection between the standard practice used in the PacifiCorp case and the fact that the standard practice was also used in Grace's case until immediately before Grace filed its amended petition for rehearing in the Montana Supreme Court. Therefore, the Department's allegation that Grace and its attorneys were aware of the secret *ex parte* draft of the opinion prior to the filing of Grace's amended petition for rehearing is totally false.

The Department further argues that Grace and its attorneys should have been aware of STAB's standard practice after the Montana District Court's decision in *Helmmco, Inc. v. Department of Revenue*, Cause No. 5082 (Montana First Judicial District, Lewis and Clark County). Resp. Br. at 4. The Department also claims, without support, that the practice was announced after hearings. Id.

This argument is particularly astonishing given that Grace's failure to learn of the standard practice is directly attributable to the steps taken by STAB and the Department to conceal the standard practice from taxpayers like Grace. The Department conveniently forgets the extraordinary actions taken by the Department and STAB after the *Helmmco* decision to ensure that later taxpayers, including Grace, did not learn of STAB's standard practice. These steps included discontinuing the use of transmittal letters previously sent along with opinions drafted by the Department so that opposing counsel would not become aware of STAB's standard practice. Pet. Br. at 9. Whatever hints

might have been available to taxpayers before the *Helmmco* decision were certainly eliminated after that decision.

2. The Department claims that (A) its secret *ex parte* communication did not have a prejudicial effect on the outcome of Grace's case (Resp. Br. at 4-5); (B) Grace had full and fair opportunity to present its entire case and all its arguments to STAB (Id.); (C) STAB reached a decision in this case before the secret *ex parte* communication with the Department (Id. at 4.); and (D) STAB ruled for and against the Department (Id. at 5.). From this last claim, the Department somehow surmises that STAB carefully considered the evidence presented in the case in reaching its ruling. Id.

The Department's statements fail to establish that the Department's secret *ex parte* communications with STAB did not alter the outcome of this case. More importantly, the statements do not establish that the outcome of this case would not have been changed if Grace had been permitted to respond to the Department's secret *ex parte* communications. The Department fails even to address these questions.

Had Grace been accorded an opportunity to respond to the Department's proposed findings and conclusions before they were frozen into STAB's opinion, Grace would have strenuously objected to those findings and conclusions. Pet. Br. at 17. Grace's objections would have required STAB to deal with the difficult issues raised by the case, and perhaps to settle on a position that was less one-sided than the Department-drafted opinion.

Furthermore, whether Grace can establish actual prejudice in this case is irrelevant. Even if the prejudice were less clear, this case would be no less deserving of consideration by this Court. Pet. Br. at 17. For the vice of *ex parte* communications like those at issue here is that they inevitably carry with them a substantial risk of prejudice, the precise impact of which may be unknown or unknowable. See *In re Wisconsin Steel Co.*, 48 Bankr. 753, 760 (N.D. Ill. 1985) cited at Pet. Br. at 17-18.

III. *The Montana Supreme Court's Decision In This Case Settled Montana Law With Respect To STAB'S Standard Practice.*

The Department argues that the validity of STAB's standard practice will "probably" be settled by the Montana courts on

independent state grounds. Resp. Br. at 9, 10-11. Contrary to the implicit assumption in this argument, the highest judicial body in Montana has already settled the validity of STAB's standard practice under state law. The Department evidenced its understanding of this fact when it cited the Montana Supreme Court's denial of Grace's amended petition for rehearing as substantive support for its position in *PacifiCorp* that STAB's standard practice was valid under state and federal law. Resp. App. C at 13a.

Since this issue has already been resolved on state law grounds, the Department apparently believes that if the Montana Supreme Court is given an opportunity to reconsider this question, the court will reverse itself and find that the practice is illegal under Montana law. This baseless speculation must be rejected. The Department, which would certainly be aware of any case in which this issue might be raised, does not cite a single case either before the Montana Supreme Court or before the Montana District Court that will allow the Montana Supreme Court to reconsider the validity of STAB's standard practice under state law. The Department's statement in its brief that "[a]s shown in Grace's Appendix this issue has been raised in several other cases currently pending in Montana courts" is incorrect. Resp. Br. at 10. None of the cases mentioned in Grace's appendix is currently pending in the Montana courts.

IV. *The Department's Secret Ex Parte Communication Affected The Outcome Of This Case.*

The Department adopts the position in its brief that the secret *ex parte* communication could not affect the Montana Supreme Court's resolution of this case. Resp. Br. at 9, 11. This argument concerning the prejudicial effect of the Department's secret *ex parte* communication should be rejected.

Any prejudice which resulted from the secret *ex parte* communication affected the outcome of Grace's case. The Montana Supreme Court must uphold all legal interpretations of STAB which do not reach an extraordinary level of misguidedness. Under the standard of review applied in this case, the Montana Supreme Court may overturn STAB's interpretation of a statute only in cases where the interpretation is " 'clearly contrary to the legislative intent behind the statute[s]' ". Pet. Br. at 7 (citation omitted).

The extraordinary deference accorded to STAB under this standard is evidenced by the Montana Supreme Court's statement that " 'it is not a judicial function to act as an authority on taxation matters.' " Id. at 7 (citation omitted). Until its convenient change of position on this issue, the Department fully agreed with Grace that the Montana courts do not interfere with STAB's interpretation of the state's tax law except in the most egregious cases. Pet. App. J at 92a-95a.

The wide latitude of error allowed by the abuse of discretion standard virtually ensures that a prejudicial *ex parte* communication which includes Department-drafted findings reflecting the Department's position on factual issues will affect the final outcome of a taxpayer's case. A reviewing court may remove the effect of a prejudicial *ex parte* communication only in those exceptional cases where it is permitted to correct a legal error. The fact that the abuse of discretion standard does allow the Montana Supreme Court to overrule STAB on occasion does not mitigate the fact that in most cases STAB's errors go uncorrected.

V. *STAB's Standard Practice Raises A Substantial Due Process Question.*

The Department seeks to belittle the significance of the due process issue this case raises by misconceiving it. This case does not present the simple question of whether it is constitutionally acceptable for courts to adopt as their own the findings and conclusions prepared by one litigant. Although many reviewing courts — including this one — have condemned that practice, it is true that they have nevertheless refused on occasion to disturb the trial court's judgment when it was supported by substantial evidence. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964). The Department relies on these cases as support for STAB's practice in this case. Resp. Br. at 12-13. The only proposition those cases support — a proposition for which Grace cited them in its Petition (Pet. Br. at 15-16) — is that courts have uniformly disapproved of the practice of adopting one litigant's submissions, even when opposing counsel has been notified and provided with an opportunity to respond to them.

This case, however, involves a far more serious abuse of the judicial process — an abuse that clearly raises a substantial due

process question. For in this case, the conclusions and findings of one party were secretly submitted *ex parte* to the adjudicative body and opposing counsel was provided with no opportunity to respond to them.

Although the Department relies on three cases (in addition to those cited above), *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661 (4th Cir. 1989), *Bradley v. Maryland Casualty Co.*, 382 F.2d 415 (8th Cir. 1967), *In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988), in support of its position that STAB's practice does not raise significant due process concerns, none of these cases supports the Department's position. In *Aiken County*, a trial court decision was attacked on the ground that the court's "near-verbatim" adoption of one party's proposed findings of fact and conclusions of law deprived the adverse party of due process of law. *Id.* at 677. The circuit court rejected this argument stating that although the procedures employed by the trial court in adopting findings and conclusions were not ideal, they were adequate to protect the parties' rights.

The circuit court's decision in *Aiken County* is understandable given the procedures employed by the trial court. These procedures deterred the types of abuses that the prohibitions against *ex parte* communications are intended to prevent. The trial court in *Aiken County* announced its general impressions on the central issue in the case to the parties at the trial. The court called for and the parties filed findings and conclusions. Since these documents were filed with the court, they were available in the record for the parties to review prior to the issuance of a final decision. If one party had overreached or exaggerated in its findings and conclusions, an opposing party could have notified the court by letter.

To Grace's extreme detriment, STAB did not employ any similar safeguards to protect Grace's rights. Unlike the trial court in *Aiken County*, STAB asked only the Department to prepare findings and conclusions, and Grace was not aware of, and not permitted to respond to, the Department's findings and conclusions.

In *Bradley*, the trial court called for and relied upon findings and conclusions that were prepared by one party to the proceeding.

382 F.2d at 422. The court found no violation of any constitutional rights in that case. *Id.* at 423. Given the court's statement that "[t]he present record . . . is unclear as to just what did happen here and we are left with no more than thin inferences," no support for the Department's position can be drawn from this opinion. *Id.* The Department candidly admits that it is unsure whether one party prepared findings and conclusions without notice to opposing counsel. Resp. Br. at 13.

In *Colony Square*, a bankruptcy court judge also called for and relied upon findings and conclusions prepared by one party to the proceedings. The Circuit Court of Appeals concluded that Appellant Colony Square was not denied due process. 819 F.2d at 276. *Colony Square* is clearly distinguishable from this case. In *Colony Square*, the district court applied its own independent consideration and analysis when it examined the tainted orders. *Id.* at 277. This independent consideration and analysis served "to correct any errors in the proceedings used by the bankrupcty judge." *Id.* In this case by contrast, the reviewing courts accorded STAB's findings and conclusions the utmost deference. The Montana courts did not act to remove the prejudicial effects of STAB's standard practice. *See* pp. 7-8 *supra*.

In short, there is no judicial support for the Department's extraordinary contention that the Due Process Clause tolerates the preparation of opinions in adversary proceedings based on the *ex parte* submissions by one party to an adversary proceeding without providing the opposing party with an opportunity to respond. STAB's "standard practice" plainly raises a substantial due process issue that this Court should resolve.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Montana Supreme Court should be granted.

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